

**'AN ANALYSIS OF THE POWERS OF ARBITRATORS IN INTERNATIONAL  
COMMERCIAL ARBITRATION'**

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## ABSTRACT

The aim of this study is to analyse the powers of an arbitral tribunal conducting arbitration proceedings under the UNCITRAL Model Law on International Commercial Arbitration and under the English Arbitration Act of 1996. The study rests on an accumulation of case law, current and secondary literature. The Thesis is divided into two parts of four and two chapters respectively. Chapter one lays down the foundational framework upon which the arbitral tribunal's powers are established and the basic standard of behaviour expected from a tribunal performing a juridical duty. The chapter identifies an arbitration agreement as a pillar upon which the process of international commercial arbitration rests. It discusses the essential attributes of the parties' agreement in detail and shows the effect that these have on the powers of a tribunal. It also shows how the expected standard of behaviour impacts on a tribunal's work. The study in essence shows how the parties are able to use their independent controlling power over the arbitration process to privately design their own dispute resolution mechanism.

Chapter two of the Thesis analyses the powers of an arbitral tribunal during the conduct of the arbitration proceedings. The study looks at the powers of the tribunal to deal with the issues in dispute between the parties and the need for it to observe the limits of its jurisdiction. The study also discusses the extent to which a tribunal is permitted by the parties to exercise procedural powers. It also shows how the parties' choice of the rules of arbitration and the procedural law influences the parties' choice of the procedure that may be adopted in an arbitration. The study in essence shows that whilst the tribunal is given the power to conduct the proceedings and resolve the dispute between the parties, the means by which the dispute is resolved remains under the control of the parties. Consequently, any procedural powers that a tribunal may exercise or any procedural assistance that it may need, requires the consent of the parties before it may be accessed. The study shows how the work of the tribunal is geared towards fulfilling the parties' wishes.

Chapter three of the Thesis looks at the power of an arbitral tribunal to make an arbitral award. The making of a final award is the ultimate task of a tribunal that also marks the end of its mandate. It is essential that the final award addresses all the contentious issues arising between the parties in finality and grants the appropriate remedies. The study also shows how the doctrine of *res judicata* prevents an arbitral tribunal from revisiting an aspect of the dispute that it has dealt with in finality. An arbitral tribunal is obliged to comply with and fulfil the requirements of the *lex arbitri* when making the final award. The study shows the need for an arbitral tribunal's final award to be binding on the parties to the arbitration agreement and enforceable at law.

Chapter four examines the nature of objective arbitrability and the power of an arbitral tribunal to define its own jurisdiction. The study discusses the benchmarks that are used to determine the question of objective arbitrability and how these act as a controlling feature over arbitrable issues as well as over the extent of an arbitral tribunal's jurisdiction. The chapter ends by discussing the extent to which an arbitral tribunal is permitted to investigate the extent of its jurisdiction.

Chapter five of the Thesis makes an analysis of the extent to which a court may be permitted to intervene in the arbitration process before the appointment of an arbitral tribunal and whilst the tribunal is conducting the proceedings. The study shows the two roles that the court performs at this stage of the proceedings. It firstly ensures that matters that parties have decided should be dealt with using the process of arbitration are sent to arbitration. Secondly, the court avails itself to rescuing the arbitration process when it is off course. In supporting the process of arbitration at this stage, the court assumes an ancillary role and therefore only deals with procedural and jurisdictional matters in a restrictive manner and not as an end in itself.

The final chapter in this study discusses the extent to which a court may intervene in the work of an arbitral tribunal after the final award. The study identifies the limited role of the court at this stage of the arbitration process, which may only be accessed by a party under limited grounds. After the award is made, the court supports the work of the tribunal by ensuring the recognition and enforcement of the award. It also assumes a supervisory role of reviewing an arbitral tribunal's conduct and exercise of its powers. In both cases however, the intervention of the court is only accessible on request. Chapters five and six of the Thesis therefore go to show that court intervention is permitted in the arbitration process by the instruments under study in a systematic way that ensures that the work of the tribunal and the exercise of its powers are not disrupted. The Thesis shows that the extent of an arbitral tribunal's powers is determined by the agreement of the parties subject to the applicable laws and rules of arbitration.



## **Declaration**

I hereby declare that this thesis has been composed by me, and that the work herein is my own.

Patricia Nchimunya Shansonga Kamanga

## **Acknowledgement**

I wish to extend my sincere and profound gratitude to Professor John Murray QC, for his guidance, inspiration and encouragement without which this Thesis would not have been completed. I will forever remain deeply indebted to him. I also wish to extend my deepest respect and gratitude to Dr Lorand Bartels, Dr Mathias Siems, Mrs Lorna Paterson and Ms Tessa Rundell.

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## Abbreviations

AAA	American Arbitration Association
A.C	Appeal Case
All ER	All English Reports
ARB	Arbitration
BIT	Bilateral Investment Treaties
BLR	Business & Legal Reports
CLOUT	Case Law on UNCITRAL Texts
Comm	Commercial
CPR	Civil Procedural Rules
DAC	Department of Advisory Committee
EDI	Electronic Data Interchange
E.G.L.R	Estates Gazette Law Reports
EHRR	European Human Rights Reports
English Act	English Arbitration Act of 1996
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HKIAC	Hong Kong International Arbitration Centre
HL	House of Lords
IBA	International Bar Association
ICC Rules	International Chamber of Commerce Rules of Arbitration of 1998
ICCA	International Council for Commercial Arbitration
I.C.J	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
I.L.M	International Legal Materials
J. Int. Arb	Journal of International Arbitration
LR(MP)(S) Act	Law Reform (Miscellaneous Provisions)(Scotland) Act of 1990
LCIA	London Court of International Arbitration Rules
Lloyd's Rep	Lloyd's Representatives
LDIP	<i>Loi federale sur le droit international prive</i>
Model Law	The UNCITRAL Model Law on International Commercial Arbitration
NCPC	<i>Nouveau code de procedure civile</i>
NLJ	New Law Journal
O.R	Ontario Reports
P.C.A	Permanent Court of Arbitration
P.C.I.J	Permanent Court of International Justice
PILA	Private International Law Act
PRC	People's Republic of China
QBD	Queen's Bench Division
Rev. arb.	Review Arbitration
SCC	Stockholm Chamber of Commerce
SGHC	Singapore High Court
SLR	Singapore Law Report
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Rules of Arbitration of 1976
UN Doc.	United Nations Document
WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports

WTAM

World Trade & Arbitration Materials

Ybk Comm. Arbn.

Yearbook Commercial Arbitration

ZPO Zivilprozessordnung [A Tenth Book of the German Code of Civil Procedure]

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## OVERVIEW OF THESIS

### I The Aims and Objectives of the Thesis

The aim of this Thesis is to discuss the extent of an arbitral tribunal's powers that is seized with the responsibility of settling an international commercial dispute between parties that have entered into an arbitration agreement. The Thesis takes the position that parties to an international commercial contract decide by consent to have any disputes arising between them resolved using their own method of dispute resolution that is presided over by their appointed arbitral tribunal. It is thus expected that such an arbitral tribunal be permitted to be in control of the arbitration proceedings with sufficient power to enable it resolve the parties' disputes in an independent and juridical manner. This Thesis therefore shows the extent of the tribunal's powers in the arbitration process. Having said this, it is important to note that although the Thesis makes occasional, unavoidable references to the power of the arbitral tribunal to determine the applicable law, the scope of the Thesis explicitly excludes the tribunal's power to determine the applicable law in procedural, substantive and regulatory areas.

This discussion has been taken on board in this Thesis in order to analyse the powers of a tribunal that performs a juridical function and makes a binding award that is capable of being enforced at law. The first part of the discussion in this Thesis (Chapters One – Four), discusses the background of the powers of an arbitral tribunal and its fundamental obligations that it owes the parties to an arbitration agreement. The discussion further aims to show the power of a tribunal to conduct the arbitration proceedings and make a final award. The study also shows the extent of an arbitral tribunal's powers over procedural and jurisdictional issues.

The second part of the Thesis (Chapters Five – Six), shows how and why the court as an arm of a legal system in a given country becomes involved in a private dispute resolution between consenting parties. The Thesis looks at the restrictive and limited nature of court intervention that is permitted in the arbitration process and its relevance. The study also shows the support that the process of arbitration receives from national legal systems that ensure that the role of an arbitral tribunal is respected by permitting it to deal with issues that are arbitrable. The Thesis states how an arbitral tribunal exercises its powers in accordance with the wishes of the parties pursuant to the governing rules of arbitration, subject to the *lex arbitri*.



## II Methodology of the Thesis

This Thesis rests on material that is an accumulation of case law, current and secondary literature. There are two reasons for this approach:

Firstly, a study of case law in this Thesis assists in forming a conclusion as to why parties to an international commercial contract that voluntarily opt out of the judicial machinery in preference to international commercial arbitration should institute court proceedings relating to a dispute that an arbitral tribunal already has conduct of. Case law helps show why it is not only the parties that may request for court intervention but the tribunal as well. It further gives a picture of how an arbitral tribunal may have exercised its powers in a given situation and the extent of those powers. The study also shows the court's reaction to such applications, the extent to which they are entertained and the effect that the court intervention has on an arbitral tribunal's work. A study of case law establishes the role that the courts play in international commercial arbitration. It finally clears the air as to who actually settles the disputes in international commercial arbitration. There is then a clarification as to whether the work is done solely by an appointed arbitral tribunal, or in conjunction with the court.

Secondly, current and secondary literature assists this Thesis in analysing, recognizing and appreciating the research that has already gone into this area of the law. It is on this foundation that this Thesis is built. It is important to note that the issues that are being raised in this Thesis arise after a study of the work that has already been carried out by eminent scholars of international commercial arbitration. The question arising here is whether the parties in an international commercial contract that choose arbitration as their set method of resolving issues arising between them permit a tribunal to exercise power and resolve the disputes between them independently and exclusively in a final and binding manner.

This Thesis takes cognisance of the fact that international<sup>1</sup> commercial<sup>2</sup> arbitration by its nature permits parties involved in an international commercial dispute to choose a seat of arbitration, which may be in either a Model Law jurisdiction or in a non-Model Law jurisdiction. An arbitral tribunal's conduct of the arbitration proceedings may therefore be governed by a law that is dependent on the choices that the parties to the arbitration agreement make. Further, the parties to an arbitration agreement may have an option of having their arbitration proceedings administered by an arbitral institution with its own set of arbitration rules or a non-institutional set of arbitration rules if at all.

With this scenario in mind, this study has based its discussion on four instruments. These are: the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter referred to as 'Model Law'), the English Arbitration Act of 1996 (hereinafter referred to as 'the English Act'), the International Chamber of Commerce Arbitration Rules of 1998 (hereinafter referred to as 'the ICC Rules'), and the United Nations Commission on International Trade Law Arbitration Rules of 1976 (hereinafter referred to as 'the UNCITRAL Rules').

This study analyses the powers of an arbitral tribunal under the Model Law and the English Arbitration Act for the following reasons: The Model Law is an instrument enacted by the United Nations that has now been adopted (with modifications in some instances), in approximately fifty countries,<sup>3</sup> thus making it the second<sup>4</sup> most widely adopted international commercial arbitration instrument.<sup>5</sup> It thus gives a clear

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<sup>1</sup> Article 1(3) of the Model Law: "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

<sup>2</sup> UN Doc. A/CN.9/264: pages 10-11: "In the early 1980s, the UNCITRAL Model Law was drafted with the aim of, *inter alia*, encouraging the adoption of a broad interpretation of the term 'commercial'..."

<sup>3</sup> Binder, (2005: v): "The Model Law has been enacted in a good number of states from different geographical areas, of all major legal traditions and at different stages of economic development. In fact the Model Law states today cover approximately one quarter of the world's territory. Several more countries are considering adopting the Model Law,..."

<sup>4</sup> The first being the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

<sup>5</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_s](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_s) - Page 1: "Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in: Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2005), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005), Egypt, Germany, Greece, Guatemala, Hungary, India, Iran

perspective of the powers of an arbitral tribunal that have received recognition globally.<sup>6</sup> The English Act being an instrument emanating from a non-Model Law jurisdiction is used as a reference point in this study in order to highlight a distinction between an arbitral tribunal's exercise of power under the Model Law and under the English Act. This distinction is necessary in assessing the effect of the *lex arbitri* on an arbitral tribunal's powers.

This study takes cognisance of the fact that parties to an arbitration agreement have, by virtue of their independent controlling power over the arbitration, a choice of subjecting the arbitration proceedings to rules of arbitration. As such, this study will use the ICC Rules and the UNCITRAL Rules as the main reference sets of rules when discussing the powers of an arbitral tribunal that conducts an arbitration that is governed by a set of arbitration rules. The reason for focusing on these two sets of arbitration rules in this study is because the ICC Rules are governed by the ICC Court that has the longest arbitration history having been established in 1923.<sup>7</sup> The Court also has a wide global representation with members from almost every continent. Further, the Court plays a crucial administrative role in the arbitration process that includes the scrutiny of the arbitral award thus providing a double protection for the parties as to the award's compliance of the law<sup>8</sup> amongst other things. The arbitration rules of the ICC are therefore able to provide a perspective of the generally accepted international arbitration practice. The UNCITRAL Rules is a set of non-institutional rules that sometimes governs *ad hoc* arbitrations.

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(Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia and Zimbabwe.”

<sup>6</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/m/-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/m/-arb/06-54671_Ebook.pdf); paragraph 2: “The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.”

<sup>7</sup> The Secretariat of the ICC International Court of Arbitration, (The ICC International Court of Arbitration – The World Business Organisation), June 1994, page 1

<sup>8</sup> Article 6 of Appendix II of the ICC Rules

### III Statement of the Thesis

This Thesis takes the position that an arbitral tribunal is appointed in the way that the parties to an international commercial contract choose. This is a private process that is based on the consensus of the parties. Party autonomy is therefore the focal point of the arbitration process. The mandate of the arbitral tribunal is essentially to fulfil the parties' wishes. Whilst the study recognizes the supremacy of the parties' autonomy it is alive to the need for the arbitration agreement to succumb to its regulatory laws in order for its ensuing arbitral award to be enforceable at law. The arbitral tribunal takes on a very exclusive role whereby it is called to act in a juridical manner in relation to the parties who may have played a major role in its appointment. By virtue of the parties' deliberate choice of how their dispute is to be resolved and by whom, the arbitral tribunal is able to assume the strings of power in the arbitration process. The tribunal therefore conducts the arbitration proceedings in accordance with the roadmap set by the parties to the arbitration agreement. Having conducted the arbitration proceedings, the arbitral tribunal is authorized by the parties to make an award that is final and binding on the parties. As a final and legally binding document, that is capable of being enforced at law, the arbitral award gives remedies to each party as prayed. This is as far as the arbitral tribunal may go.

Almost all countries that support international commercial arbitration are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (hereinafter referred to as 'the New York Convention'). By virtue of this treaty, member countries are obliged to recognize an arbitration agreement in writing<sup>9</sup> and refer parties to arbitration in honour of their agreement.<sup>10</sup> This is aimed at ensuring that parties are not hindered from utilizing their chosen method of dispute resolution even across borders. Apart from that their arbitral award is able to receive recognition and

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<sup>9</sup> Article II(1) of the New York Convention: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration."

<sup>10</sup> *ibid*, Article II(3): "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."



may therefore be enforced in all the member countries of the New York Convention,<sup>11</sup> thus making it an internationally recognized dispute resolution mechanism.

An arbitral tribunal that makes a final and legally binding award that is capable of being enforced at law is expected to conduct its work subject to a law chosen by the parties. The validity of the arbitral award is gauged against the law that the arbitral tribunal may have applied to its arbitration proceedings. Consequently, whilst an arbitral tribunal may act in accordance with the wishes of the parties, it has a responsibility of ensuring that the said wishes conform to the laws at the seat of the arbitration and the rules of arbitration under whose auspices it is to conduct the arbitration.

Further, an arbitral tribunal must ascertain the validity of the arbitration agreement against the law chosen to govern it. An arbitral tribunal must establish and remedy the parties' rights and obligations in the contract in accordance with the law chosen by the parties to regulate those rights and obligations. In short, an arbitral tribunal must take into consideration the law chosen by the parties to govern every aspect of the arbitration. Party autonomy must therefore be interpreted in accordance with the governing laws and rules of arbitration. Where the governing laws and rules of arbitration are in conflict, the governing laws take precedence over the arbitration rules, as it is the governing laws that give the work of the tribunal its legality and efficacy.

Apart from giving the arbitral tribunal's work its efficacy, the *lex arbitri* also makes available the court machinery to a party that requests for a judicial review of an arbitral tribunal's juridical functions. A party is therefore at liberty to request a court to look into an arbitral tribunal's exercise of its jurisdictional or procedural powers. Further, a party may request a court at the seat of the arbitration to set aside the arbitral award that has not been conducted in accordance with the agreement of the parties and the governing law or rules of procedure. A party in whose favour an arbitral award is made may request a court in any country where the losing party has assets to recognize and enforce an award in instances where the losing party does not do so willingly. Whilst a court cannot resolve a dispute in an international commercial arbitration, it has got the power to check

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<sup>11</sup> *ibid*, Article I(1): "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."



when requested to do so by a party that the arbitral tribunal is working or has worked in accordance with the roadmap that the parties will have mapped out for it. This Thesis will conclude by showing that national systems of law stand on the sidelines to rally behind the arbitral tribunal as it conducts the arbitration proceedings in fulfilment of its mandate. The systems of law may through their court machinery, raise a flag where an arbitral tribunal acts off-limits in relation to its jurisdiction.

## PART ONE

### THE BASIS OF AN ARBITRAL TRIBUNAL'S POWERS: ITS POWER TO CONDUCT ARBITRATION PROCEEDINGS AND MAKE AN AWARD

#### CHAPTER ONE

##### AN EXAMINATION OF THE BACKGROUND OF AN ARBITRAL TRIBUNAL'S POWERS AND ITS FUNDAMENTAL STANDARD OF CONDUCT

###### Introduction

The aim of this chapter is to discuss the arbitration agreement and the arbitral tribunal's standard of behaviour that is accepted as the norm by the instruments under discussion in this study. The study takes the position that an arbitration agreement is an essential instrument that establishes the parties' obligation to arbitrate their disputes and further defines a tribunal's powers and jurisdiction and the extent to which they are applicable. The agreement of the parties to arbitrate is the reference point by which an arbitral tribunal's powers and jurisdiction are interpreted subject to the applicable laws.<sup>1</sup> An arbitral tribunal is expected to assume and uphold the standard of behaviour befitting a tribunal whose function is juridical in nature. The Model Law places a mandatory obligation on the tribunal to uphold a set standard by which it may conduct itself. The English Act also requires a tribunal to maintain set moral standards during the period of its mandate. These moral principles are also demanded of the tribunal by the rules of arbitration under discussion. It is for this reason that this study takes these standards of behaviour as the acceptable norm.

This chapter begins by analyzing the nature of an arbitration agreement and its essential attributes. It goes on to focus specifically at a Bilateral Investment Treaty and how a foreign investor who is a national of a country that is a party to a treaty, is able to exercise autonomy when considering an offer to arbitrate made by the country in which

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<sup>1</sup> Redfern (2004: 233): "...the powers, duties and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the award may be sought."

he has invested. By accepting the standing offer, the foreign investor is deemed to have consented to the terms of arbitration provided by the treaty. It is only when the foreign investor accepts the offer that an arbitration agreement is made between the foreign investor and the country he has invested in. The study will also show how the parties' choice of the rules of arbitration to govern the arbitration proceedings further extends the tribunal's powers. A reference to the chosen rules of arbitration by a tribunal enables it *inter alia* to know the procedure to follow in the event of the parties failing to agree on an aspect of the arbitration.

## I THE NATURE OF AN ARBITRATION AGREEMENT

### I.1 The Essential Attributes of an Arbitration Agreement

The autonomy of the parties to privately select the mechanism by which the disputes that arise in their international commercial contracts may be resolved is the main attractive feature to the process of international commercial arbitration. It is now common practice for business entities internationally to add an arbitration agreement to their contracts. The way in which an arbitration agreement is defined is a basis by which one is able to ascertain the wishes of the parties and the jurisdiction of an arbitral tribunal. These wishes are condensed into an arbitration agreement. The term 'arbitration agreement,' is defined by the Model Law<sup>2</sup> as follows:

*(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not...."*<sup>3</sup>

The definition of the term 'arbitration agreement' as stated by the Model Law above shows the existence of four essential attributes in an arbitration agreement. These are:

- The consent of the parties to arbitrate;
- The emergence of a dispute<sup>4</sup> between the parties;<sup>5</sup>

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<sup>2</sup> A/CN.9/592: Article 7(1) of the Model Law

<sup>3</sup> A/CN.508, paragraph 19

<sup>4</sup> *Greece v. United Kingdom*, Judgment of 30 August 1924 (Merits), 1924 P.C.I.J (ser, A), No. 2, page 11: The term dispute had been...defined as "a disagreement on a point of law or fact, a conflict of legal views

- The existence of a defined legal relationship between the parties and;
- The separate nature of an arbitration agreement from the parties' relationship whether it is contractual or not.

The Dervaird Scottish Advisory Committee on Arbitration Law recognized the need for legal systems adopting the Model Law to refrain from departing from its language unless such a departure was essential to enable the Model Law to fit into that country's legal structure.<sup>6</sup> This position by the Committee set in motion the enactment of the LR(MP)(S) Act<sup>7</sup> in the year that followed. When adopting the Model Law, Scotland chose not to depart from the Model Law's definition of the term 'arbitration agreement' by adopting it verbatim.<sup>8</sup> This is the position that has been assumed by most countries that have adopted the Model Law. An example here is Austria that adopted the Model Law in 2006.<sup>9</sup> Most countries that support international commercial arbitration have in place legislation that permits parties to arbitrate if they so wish.<sup>10</sup> The ingredients of the arbitration agreement must be satisfied in accordance with how each legal system chooses to define the term.

For all intents and purposes, the definition of the term arbitration agreement established under the English Act supports the definition in the Model Law to a great extent.<sup>11</sup> It states that:

*"...an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)"*<sup>12</sup>

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or interests between two persons," or "as a situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance of a legal obligation."

<sup>5</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_s](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_s), page 18, paragraph 18: "Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute...or a future dispute..."

<sup>6</sup> Lord Dervaird, (1989: paragraph 1.11): "...the main object of the Model Law is to provide a framework for arbitration which is readily understandable by people of very different legal cultures. Accordingly, the Committee recommends that any legislation to give effect to its proposals should depart from the language of the Model Law only where essential..."

<sup>7</sup> Section 66 of Schedule 7 of the LR(MP)(S) Act of 1990

<sup>8</sup> *ibid*, Article 7(1)

<sup>9</sup> Article 58(1) of the New Austrian Arbitration Act

<sup>10</sup> Rivkin (2006: 399)

<sup>11</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd* [1981] A.C. 356 (HL)

<sup>12</sup> Section 6(1) of the English Act

Lord Mustill identifies the characteristics of an arbitration agreement as follows:

1. *"The results are binding on the parties.*
2. *The substantive rights are to be determined by the person to whom disputes are referred.*
3. *The tribunal's jurisdiction is determined from what the parties have agreed.*
4. *The parties must intend that the award will be enforceable.*
5. *The parties must agree on the appointment of the arbitrator or the means of his appointment."*<sup>13</sup>

These characteristics advocate for an agreement that is binding and enforceable and is presided over by a tribunal whose jurisdiction is determined by the agreement itself. They focus on the consequences of the parties' choice to arbitrate. By agreeing to arbitrate the parties agree to appoint their own tribunal or decide how it is to be appointed. It is the tribunal that resolves their disputes whilst working within the jurisdiction defined by the arbitration agreement.

Dr Berger defines the term arbitration as follows:

*"Arbitration may be defined as a private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law."*<sup>14</sup>

This definition recognizes the following attributes as constituting the term 'arbitration':

- The private nature of the process of arbitration;
- The autonomy of the parties to agree to resolve their disputes using the process of arbitration;
- The recognition of the fundamental obligation of fair play that an arbitral tribunal owes the parties throughout its mandate;
- The binding nature of an arbitral award on the parties to the arbitration agreement;
- The recognition at law of the parties' private dispute resolution mechanism which recognition enables the ensuing award to be enforceable at law.

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<sup>13</sup> Mustill (2001: 95)

<sup>14</sup> Berger (2006: 297)



The definition further recognizes the need for an arbitral tribunal to abide by a set standard of behaviour. This study takes the position that the term 'arbitration agreement' should amongst other things encompass the following elements:

- The consent of the parties to honour the terms of the agreement that they freely agree to;
- The appointment of an arbitral tribunal to resolve the dispute;
- The existence of a definitive international commercial<sup>15</sup> contract that gives each party defined legal rights and obligations that the parties may wish an arbitral tribunal to ascertain in the event of a dispute arising;
- The identification of the subject-matter in dispute that the parties have agreed to submit to a particular arbitration;
- The separate nature of an arbitration agreement

It is the position of this study that the establishment of these five elements in an arbitration agreement in turn assists in defining the scope of the agreement and the jurisdiction within which an arbitral tribunal is to function and exercise its powers. In order to be enforceable, an arbitration agreement has to satisfy its defining characteristics that are contained in its definition.<sup>16</sup> From the definitions of the term 'arbitration agreement' referred to above, it is clear that party autonomy<sup>17</sup> plays a fundamental role in arbitration as the parties have to be in agreement to all the terms relating to their arbitration. Their agreement extends to the steps that may be adopted in the event of the parties failing to agree. This study analyzes hereunder the main attributes of an arbitration agreement in detail.

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<sup>15</sup> Article 1 (Footnote No. 2) of the Model Law: "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

<sup>16</sup> Mustill (2001: 5 & 95)

<sup>17</sup> Taylor Woodrow Holdings and another v. Barnes & Elliott Ltd [2006] 2 All ER (Comm) 735 at page 747: "Party autonomy is one of the founding principles of modern arbitration law..."

### 1.1(i) The Consent of the Parties to Arbitrate

The English Act<sup>18</sup> like the Model Law, draws attention to the importance of the arbitration agreement as being an instrument by which the parties' intentions are expressed.<sup>19</sup> An agreement that is governed by the Model Law must be drawn so as to satisfy its essential elements. The need for the consent of the parties highlights the private nature of arbitration. By consenting to arbitration, the parties become bound to the terms of an arbitration agreement that they freely make. The parties further expressly consent to be bound by the award that is made by the arbitral tribunal, which award is capable of being enforced at law in the country where the losing party has got assets. The enforcement of an award in an enforcing State marks the recognition in the public arena of a private dispute resolution mechanism. Once the parties to an arbitration agreement give their consent to arbitrate the consent may not be unilaterally withdrawn. It must be noted that the consent of the parties is only applicable up to an arbitral tribunal making the award. Thereafter, issues pertaining to the award are unilateral decisions of each party.

There is a general consensus in arbitration that requires an arbitration agreement to be in writing although oral agreements are also used in practice. The English Act recognizes oral agreements whose terms are in writing.<sup>20</sup> The Model Law has also recently been revised<sup>21</sup> to be in conformity with this position.<sup>22</sup> The revised version of Article 7 has widened the written requirement to include an agreement concluded orally so long as the terms of the agreement are reduced to a written form. It now also includes electronic data interchange.<sup>23</sup> The revision of Article II(2) of the New York Convention may assist

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<sup>18</sup> Arbitration Bill of the DAC on Arbitration Law, paragraph 108(3)

<sup>19</sup> *Kershaw Mechanical Services Ltd v. Kendrick Construction Ltd* [2006] 2 All ER (Comm) 81 at page 82: "...party autonomy was one of the three general principles upon which Part I of the 1996 Act was founded...."

<sup>20</sup> Section 5.5 of the English Act

<sup>21</sup> A/6/17 – Article 7(3) of the Model Law

<sup>22</sup> A/CN.9/592, paragraph 57: "... paragraph (2) of the revised draft Article 7 sought to deal with different issues, namely; To state the principle that an arbitration agreement shall be in writing; To determine whether the purpose of the writing requirement was to provide certainty as to the consent of the parties to arbitrate or as to the contents of the arbitration agreement; and To clarify how the writing requirement could be fulfilled."

<sup>23</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_s...](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_s...) Page 18, paragraph 19: "While oral arbitration agreements are found in practice and are recognized by some national

parties whose arbitration proceedings are governed by the English Act or the Model Law to satisfy the requirements of Article IV(1)(b) of the Convention. In determining the interpretation of the extent of the writing requirement Christopher Clark J. decided in the case of *Bernuth Lines Ltd v. High Seas Shipping Ltd*<sup>24</sup> that the commencement of arbitration proceedings by email was valid. Parties may therefore execute contracts containing arbitration clauses via e-mail as was the case in *Ibeto Petrochemical Industries Ltd v. M/T "Beffen" and Bryggen Shipping and Trading A/S*.<sup>25</sup>

### I.1(ii) The Appointment of an Arbitral Tribunal

The appointment of an arbitral tribunal is one of the essential elements of an arbitration agreement. By submitting to the process of arbitration, the parties must be understood to have put in place a mechanism for the appointment of an arbitral tribunal to resolve their disputes and determine their rights and obligations. The parties to an arbitration agreement have got the exclusive prerogative to appoint an arbitral tribunal and agree on its composition. The parties therefore have to decide and be agreed on three issues being:

- The number of arbitrators and;
- The procedure by which they are appointed
- The procedure to be adopted when the parties fail to agree

The tribunal that is formed is given the sole responsibility of steering the arbitration to its conclusion. It determines the parties' bone of contention, deals with the issues in dispute, collects evidence, and makes an arbitral award that is in essence final and binding.

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laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement"

<sup>24</sup> [2006] 1 All ER (Comm) 359

<sup>25</sup> Case No 05 Civ. 2590 (SAS), US District Court for the Southern District of New York

### 1.1(ii)(a) The Number of Arbitrators

Under the Model Law<sup>26</sup> and the English Act,<sup>27</sup> the parties to an arbitration agreement have got the freedom to select any number of arbitrators to form the tribunal. Where there is no consensus between the parties on the number of arbitrators that is to be appointed, the Model Law provides for three arbitrators<sup>28</sup> whilst the English Act provides for one arbitrator.<sup>29</sup> Whilst an arbitration agreement under the English Act may provide for a sole arbitrator when the parties fail to agree on the number of arbitrators, an arbitration agreement that is governed by the Model Law may not provide for a sole arbitrator in such circumstances.

Under the default procedure for the appointment of an arbitral tribunal the ICC Rules provide for a sole arbitrator to be appointed by the Court.<sup>30</sup> The rules further provide for the parties to nominate an arbitrator each and for the Court to appoint the third arbitrator in a three-man tribunal.<sup>31</sup> A complicated dispute may require to be resolved by three arbitrators whereas a less complicated one may only require the appointment of one arbitrator.<sup>32</sup> All arbitrators are however confirmed by the Court.<sup>33</sup> The UNCITRAL Rules makes provision for three arbitrators where the parties fail to agree on the number of arbitrators to be appointed.<sup>34</sup> In practice, it is more often than not for a tribunal to be made up of an uneven number of either one or three.<sup>35</sup>

### 1.1(ii)(b) The Procedure for Appointing an Arbitral Tribunal

Parties to an arbitration agreement are free to determine the procedure that they may use to appoint an arbitral tribunal under the Model Law<sup>36</sup> and the English Act.<sup>37</sup> Where the

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<sup>26</sup> Article 10(1) of the Model Law

<sup>27</sup> Section 15(1) of the English Act

<sup>28</sup> *op cit*, Article 10(2)

<sup>29</sup> *op cit*, Section 15(3)

<sup>30</sup> Article 8(2) of the ICC Rules

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*, Article 8(4)

<sup>34</sup> Article 5 of the UNCITRAL Rules

<sup>35</sup> Section 15(2) of the English Act

<sup>36</sup> Article 11(2) of the Model Law

parties to an arbitration agreement fail to agree on the procedure for appointing an arbitral tribunal, this may be determined in accordance with the provisions of the governing law. In default of agreement, the procedure provided by the Model Law<sup>38</sup> and the English Act<sup>39</sup> is dependent upon the number of arbitrators that the parties have agreed should be appointed.

Where the arbitration has provided for a sole arbitrator under the Model Law, and the parties fail to agree on one, the decision may be made by a court.<sup>40</sup> Where the parties agree on three arbitrators or do not agree on a number of arbitrators at all, each party may appoint one arbitrator under the Model Law and the two appointed arbitrators select the third arbitrator. If the parties each fail to appoint an arbitrator, a court may make the appointment. This procedure is also followed when the two arbitrators appointed fail to agree on the third arbitrator.<sup>41</sup> A decision of the court under such circumstances may not be subject to appeal.<sup>42</sup> This is aimed at promoting the finality of issues and ensuring that the arbitration is not stalled, thus affecting the speed of the arbitration.

Under the English Act the parties are free to agree on a default procedure to be adopted to appoint a tribunal in the event of the failure of the agreed procedure.<sup>43</sup> Where each party is supposed to appoint an arbitrator and one party fails to do so, the other party's appointed arbitrator may be proposed as the sole arbitrator to the other party.<sup>44</sup> But if both parties fail to appoint an arbitrator, a court may appoint a sole arbitrator.<sup>45</sup> Such an appointment that is made by the court cannot be altered unilaterally.<sup>46</sup> Unlike the default procedure under the Model Law that may not be appealed against when made by a court, the English Act permits appeals with the leave of the court.<sup>47</sup> The fact that the Model

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<sup>37</sup> op cit, Section 16(1)

<sup>38</sup> op cit, Article 11(3)

<sup>39</sup> op cit, Section 16(2), (3), (4) & (5)

<sup>40</sup> op cit, Article 11(3)(b)

<sup>41</sup> ibid, Article 11(3)(a)

<sup>42</sup> ibid, Article 11(5)

<sup>43</sup> Section 18(1) of the English Act

<sup>44</sup> ibid, Section 17(1)

<sup>45</sup> ibid, Section 18(3)(d)

<sup>46</sup> ibid, Section 18(4)

<sup>47</sup> ibid, Section 18(5)

Law does not provide for an appeal of a decision of a court prevents undue delay in the arbitration. The English Act also promotes this notion by placing restrictions on undue court intervention in the form of the leave to appeal from the court.

It is evident from the discussion that the involvement of arbitrators in the appointment of other arbitrators is very minimal under both the Model Law and the English Act as the selection of the team that is to resolve the dispute must lie in the hands of the parties themselves if party autonomy is to be established. Consequently, under both instruments under discussion, the involvement of arbitrators is only permissible when appointing a third arbitrator in a three-man tribunal.<sup>48</sup> In both cases however, the tribunal may only exercise this power with the consent of the parties which consent is exhibited by each party appointing an arbitrator.<sup>49</sup>

The ICC Institute almost wholly administers arbitrations that are conducted under the auspices of its Rules. As such, the appointment and confirmation of an arbitral tribunal falls under the control of the Court.<sup>50</sup> The Rules make provision for an arbitral tribunal to be involved in the appointment process of other members of the tribunal if the parties agree, which is often the case in practice.<sup>51</sup> The UNCITRAL Rules permit an arbitral tribunal to appoint a third arbitrator in a three-man tribunal.<sup>52</sup> The practice of permitting an arbitral tribunal to participate in the appointment of other arbitrators at a minimal level enables the parties to be certain of having their dispute determined by an arbitral tribunal of their own choice. Further the need for confirmation of an arbitral tribunal by the Court gives an assurance to the parties of an arbitrator's independence<sup>53</sup> and his ability to function under the chosen rules.<sup>54</sup>

The Model Law and the English Act as well as the rules of arbitration referred to above all provide for an arbitral tribunal composed of an uneven number where parties fail to

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<sup>48</sup> Footnote No. 41

<sup>49</sup> Section 16(5)(a) of the English Act

<sup>50</sup> Article 9(2) of the ICC Rules

<sup>51</sup> *ibid*, Article 8(4)

<sup>52</sup> Article 7(1) of the UNCITRAL Rules

<sup>53</sup> Article 7(1) of the ICC Rules

<sup>54</sup> *ibid*, Article 7(5)



agree.<sup>55</sup> The fact that the arbitrators are given the power to select the third arbitrator who then becomes the chairman shows the confidence that the parties have in their appointed arbitrators. Under the Model Law<sup>56</sup> and the English Act,<sup>57</sup> the third arbitrator that is appointed by the other two arbitrators has power to address and make decisions pertaining to procedural questions if he is authorized to do by the parties or the other members of the tribunal. This promotes speed in the arbitration proceedings, as the presiding arbitrator is able to make instant procedural decisions, whilst ensuring that the proceedings get underway. Any decisions in the form of an arbitral award or an order must however be made by a majority of the members of the tribunal.<sup>58</sup> It is only fair that the final decision of the arbitration is made by a majority of the members of the tribunal. Where the votes are tied, the presiding arbitrator has got the casting vote thus creating a majority.

#### 1.1(iii) The Existence of a Defined Legal Relationship between the Parties

In an international commercial transaction where the parties choose to be legally bound by the terms and conditions of their transaction, the transaction gives each party certain rights and obligations that they are bound to honour. A party that fails to perform his part of the bargain may face legal consequences if he does not willingly rectify the breach and the claimant may receive legal protection under the parties' chosen system of law.<sup>59</sup> The claimant may institute arbitration proceedings before an arbitral tribunal in order for it to remedy any issues in contention. As the tribunal's job is to establish legal rights and obligations, its actions and decision may be regulated by a system of law. The parties may state in their arbitration agreement the systems of law by which their arbitration agreement may be regulated. They may further state the system of law that may regulate other aspect of their arbitration agreement.<sup>60</sup> It is these systems of law that hold the

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<sup>55</sup> Article 10 of the Model Law & Section 15 of the English Act

<sup>56</sup> Article 29 of the Model Law

<sup>57</sup> Section 20 of the English Act

<sup>58</sup> *op cit*

<sup>59</sup> Tweeddale (2005: 255-256): "Party autonomy permits the parties to choose the laws and make the rules which govern the arbitral proceedings. It is not however absolute.."

<sup>60</sup> *XL Insurance v. Owens Corning* [2000] 2 Lloyd's Rep. 500: "Parties' freedom of choice includes freedom to choose different systems of law to govern different aspects of their relationship."

arbitration in place and give it its legality and efficacy.<sup>61</sup> Without the backing of a law, the decision of an arbitral tribunal may not be enforceable at law.

In order for an arbitration agreement to qualify as a source of power for the arbitral tribunal it must be recognized as valid by the law of the country in which its recognition and enforcement is required. In the same vein where the parties choose general principles of law to govern the recognition and enforcement of the arbitration agreement, it is by those standards that the arbitration agreement will be legally recognized. The validity of the arbitration agreement is measured in relation to the law that is chosen to regulate it. Therefore, the fact that an agreement is valid in a Model Law country does not imply that the same agreement may be considered as valid when subjected to a non-Model Law system. The existence of a valid agreement implies that the characteristics in the definition of arbitration agreement are satisfied in accordance with the regulatory law.

An arbitration agreement requires that the parties' decision to arbitrate their disputes conforms to the laws that they choose to regulate their agreement as well as to the public policy considerations that are considered as essential at the seat of the arbitration.

Oguntade JCA in *Baker Marina v. Danos*<sup>62</sup> stated among other things that:

*"When parties make a submission (to arbitration) they do so for a number of reasons. These include simplicity of the arbitral process, the speed, and sometimes an understanding or technical knowledge of the subject matter. It is usually not because it was believed the arbitrator could not make an error of law."*<sup>63</sup>

Therefore as the parties agree by consent to the terms of their agreement, they may only alter their terms by consent. As much as most countries may encourage parties to arbitrate,<sup>64</sup> their arbitration agreement must conform to the public policy considerations that the parties are not permitted to derogate from. In the case of *Mitsubishi Motors*

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<sup>61</sup> Channel Tunnel Group Limited v. Balfour Beatty Construction Limited [1993] A.C 334 at page 357-358: "It is by now firmly established that more than one national system of law may bear upon an international arbitration..."

<sup>62</sup> (2001) 7 NWLR 337 at page 355

<sup>63</sup> Quoted in the case of IPCO (Nigeria) v. Nigerian National Petroleum (2005) 2 Lloyd's Law Reports 326 at page 331

<sup>64</sup> Rivkin (2006: 399)

*Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>65</sup> the court held that issues pertaining to anti-trust regulations were arbitrable when they involved international transactions. Apart from the public policy consideration, the arbitration agreement may not derogate or be in conflict with the social, political or economic interests at the seat of the arbitration. The English Act<sup>66</sup> states in its Section 1(b) as follows:

*“The provisions of this Part are founded on the following principles, and shall be construed accordingly- the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;”*<sup>67</sup>

The requirement of the agreement of the parties to arbitrate being subject to public interest safeguards in a given legal system, shows that the parties’ autonomy to arbitrate is subject to their chosen regulatory laws. The law to which the arbitration agreement is to be subjected to must recognize the arbitration agreement as an enforceable instrument. Therefore, having agreed on certain disputes to be referred to arbitration, the question that the parties should be asking themselves is, whether the law to which they wish to subject that arbitration permits such a process. The House of Lords stated in the case of *Lesotho Highlands Development Authority v. Impregilo SpA and others*<sup>68</sup> that the powers of an arbitral tribunal are found in the arbitration agreement as read together with the curial law and not in the underlying contract between the parties.

#### 1.1(iv) The Emergence of a Dispute between the Parties

An international business transaction contains terms and conditions that each party agrees to abide by and perform. The offer and acceptance of those terms seals the transaction and determines the role that each party may perform. The transaction therefore has to be performed in accordance with the agreed terms. There may however be minor changes to the terms of the contract that the parties may agree to take on board. For example, a foreign company may be contracted by a local electrical company to replace the underground cables with overhead ones. The parties may require the project to be

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<sup>65</sup> [1985] 474 U.S 614

<sup>66</sup> Footnote No. 19, at page 82

<sup>67</sup> Section 1(b) of the English Act

<sup>68</sup> [2005] 2 All ER 265 at page 276

completed within a period of six months at an agreed price. However, say for instance that due to a delay in procuring raw materials, the project requires more time and is therefore not completed within the prescribed time frame. If the foreign company anticipates the delay and brings it to the attention of the electric company within reasonable time the parties may agree by consent to any changes in the terms of the contract in terms of time. Such an amicable agreement may however only be agreed to if the foreign company agrees to absorb any extra costs arising from the extended time.

Where however, the cost of the raw materials increases whilst the work is still in progress, and the foreign company refuses to bear the cost of the increase in costs, then the change in circumstances is material as it in effect alters the terms and conditions of the contract. This may lead to the commencement of arbitration proceedings as a result of a dispute in the cost of the project. In the *Channel Tunnel*<sup>69</sup> case, the parties' failure to agree on the amount payable for work done on the cooling system resulted in the dispute being referred for arbitration in Brussels. The Channel Tunnel project related to one of the major international construction contracts of the 20<sup>th</sup> century.

The parties in that case did not foresee the immediate need of a cooling system at the signing of the contract. It however became apparent that the system was immediately required and in the meantime no provision had been agreed upon as to the cost of the work to install the cooling system. The contract was varied accordingly, but the parties still failed to agree on the cost hence the suspension of works pending agreement of costs and the eventual institution of arbitration proceedings. Parties that are involved in an international commercial transaction that contains an arbitration agreement may resort to arbitration when they are unable to agree on an issue. The existence of a difference therefore marks the emergence of a dispute and consequently the arbitration proceedings.

The parties' choice of a tribunal to deal with a dispute arising, may be influenced by the subject matter of the dispute in the sense that the parties may prefer a tribunal that has got the expertise or experience that relate to the issues in dispute. For instance, a difference

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<sup>69</sup> Footnote No. 61

relating to the cost of the project as in the example given above may benefit from an arbitrator with a legal or accountancy background. On the tribunal's part, the discernment of the subject matter in the dispute that the parties wish it to resolve is fundamental to its work. An arbitral tribunal must ensure that the subject matter it is dealing with is within the scope of the arbitration agreement and relates to the parties to the agreement.

Under the Model Law, an arbitral tribunal is able to discern the subject matter in the dispute from the statement of claim, defence and counter claims that the claimants and respondent submit.<sup>70</sup> An arbitral tribunal operating under the auspices of the ICC Rules has got the opportunity of drawing the Terms of Reference which encompass "*a summary of the parties' respective claims and the relief sought by each party with an indication to the extent possible of the amounts claimed or counterclaimed*".<sup>71</sup> The claim and remedy sought, the defence, as well as the counterclaims, puts the tribunal in a clear picture of the subject matter in dispute that it is called to resolve.

There is need for an arbitral tribunal to examine the kind of disputes that the parties in a contract may have indicated should be referred to arbitration. The parties may either give the disputes a broad or narrow meaning. Disputes that are 'all inclusive' may relate to a broad subject matter such as a breach of contract. Alternatively, the parties may specifically spell out the kind of dispute in narrow terms such as a dispute only relating to a difference in the payments due or to the question of interest. As to whether a dispute is defined narrowly or broadly is dependent on how the arbitration agreement is framed. It must in essence impart the wishes of the parties.<sup>72</sup>

An example is the case of *Nisshin Shipping Co. Ltd v. Cleaves & Company Ltd & Others*.<sup>73</sup> The brief facts of the case were that the respondent negotiated on behalf of the applicant, nine charters each of which contained its own arbitration clause. Each charter

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<sup>70</sup> Article 23(1) of the Model Law

<sup>71</sup> Article 18(1)(c) of the ICC Rules

<sup>72</sup> This reasoning was also followed in the case of *Harbour Assurance Co. (UK) Ltd. V. Kansa General Insurance Co. Ltd.*, (1993) Q.B. 701.

<sup>73</sup> [2004] 1 All ER 481



party was to pay commission to the respondent, and in the event of a dispute relating to non-payment of commission, the respondent was at liberty to use the arbitration clauses to exercise its right of enforcement of the commission. The court held that the respondent was entitled to invoke its rights through the process of arbitration as the dispute was within the scope of all the nine arbitration clauses and the team of arbitrators had jurisdiction to hear the case.

It was possible for this to happen even though the respondent was not a party to any of the nine agreements because there was legislation in place and all the arbitration clauses were worded in a wide enough manner to cover such disputes. But the arbitrators had to join the respondent to the application as an interested party. This case places emphasis on the need for an arbitral tribunal to appreciate the terms and reasoning of the contract as well as the arbitration agreement in order to avoid fatal errors of judgment. This case may be contrasted with the case of *Esso Petroleum Co. Ltd v. Texaco Ltd*<sup>74</sup> wherein the court found that the arbitrator had made fatal errors of judgment. The errors that the arbitrator made in this case may have been avoided if the arbitrator had engaged the services of an expert in company law for instance.<sup>75</sup>

The subject matter of the disputes that an arbitral tribunal may be assigned to handle may relate to contract or may only cover a remedy of interest. The test is whether the subject matter of the dispute falls within the matters that the parties have agreed should be referred to arbitration. The subject matter must not only be clear and precise, but the arbitration clause itself must be sufficiently wide to cover all aspects in order for one arbitral tribunal to hear the dispute if the parties so wish. The disadvantage of a narrow arbitration clause is that it allows for contrary decisions to be arrived at by two sets of arbitral tribunals appointed to deal with separate segments of a dispute. This would result from the wording of an arbitration clause which does not give authority to one arbitral tribunal to deal with the whole dispute, thus resulting in the appointment of another set of

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<sup>74</sup> [1999] QBD (Commercial Court), (WL 1556576)

<sup>75</sup> *ibid*



arbitrators to deal with the part of the dispute that is not allotted to the arbitral tribunal to resolve. However, this is the prerogative of the parties.

The disputes that the parties wish to be resolved in a particular arbitration, guide an arbitral tribunal in terms of the subject matters that it is permitted to resolve. This ensures the accurate settlement of the dispute between the parties by the tribunal. The resolution of the dispute is the fundamental duty of the arbitral tribunal and the basis upon which it is appointed. The dispute may result as a result of a difference on a question of law or fact or both. In either case however, the kind of dispute that the parties wish to be resolved using the process of arbitration must fall within the scope of the arbitration agreement in order for the appointed arbitral tribunal therein to have the power to resolve it.

#### I.1(v) The Separate Nature of an Arbitration Agreement from the Parties'

##### Relationship whether Contractual or not

The separability<sup>76</sup> principle enables the validity of an arbitration agreement to be identified independently of the parties' international commercial contract. As such the fact that the instrument containing the arbitration agreement is declared invalid by its governing law does not imply that the arbitration agreement is also invalid by the same terms, as the validity of the arbitration agreement may be measured by bench marks that are different from those used to gauge the validity of the parties' contract. The separability principle was expressed by the Court of Appeal in the case of *Harbour Assurance Co. (UK) Ltd v. Kansa General International Insurance Co. Ltd and others*.<sup>77</sup> In the case of *Heyman v. Darwins*,<sup>78</sup> the House of Lord observed that an arbitration agreement survives repudiation of the substantive bargain. Section 7 of the English Act states that:

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<sup>76</sup> Article 16(1) of the Model Law: "...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract...."

<sup>77</sup> [1993] 1 Lloyd's Rep. 455

<sup>78</sup> [1942] A.C.356 (HL)

*“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”<sup>79</sup>*

#### I.1(vi) An Arbitration Agreement Governed by Rules of Arbitration

Where parties to an arbitration agreement wish to have their arbitration proceedings governed by a set of arbitration rules, the agreement must make provision for such an arrangement. If the parties intend that the arbitration agreement be subjected to the administration of an arbitral institution or be governed by a set of arbitration rules, this position must be explicitly provided in the parties' agreement. If the parties select the ICC Rules for example as their governing rules, then the administrative system of the institute steers the arbitration proceedings in the direction set by the institute. An arbitration agreement may therefore be formulated in the following terms: 'All disputes arising from this contract shall be finally settled by arbitration in Geneva under the ICC Rules.'

This arbitration agreement may be interpreted in the following ways:

1. There is consent between the parties to an identified contract to arbitrate;
2. All subject matters in dispute between the parties arising from the said contract shall be resolved by arbitration;
3. The seat of arbitration is Geneva;
4. The *lex arbitri* shall be the Swiss Law;
5. The arbitration proceedings shall be governed by the ICC Rules;
6. The arbitral tribunal shall be appointed by the ICC Court;
7. The award shall be made in Geneva and;
8. The validity of the arbitral award shall be determined by Swiss Law.

The framework that encompasses the powers of an arbitral tribunal is easily discernable under an arbitration that is governed by rules of arbitration as the rules spell out in their

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<sup>79</sup> Section 7 of the English Act

provisions the 'do's' and 'don'ts' of a tribunal. The rules of arbitration are available to parties to an arbitration agreement as an extension of the means by which an arbitral tribunal's jurisdiction and powers may be determined. Since parties to an arbitration agreement have got the prerogative to choose any set of arbitration rules to govern their arbitration this flexible approach enables the parties to choose those rules that suit a specific arbitration process. Through the governing arbitration rules an arbitral tribunal may in essence be able to source additional powers to enable it perform its work effectively.

Rules of arbitration may be institutional or non-institutional. Institutional and non-institutional rules of arbitration are both able to determine an arbitral tribunal's powers. The ICC Court for instance, appoints<sup>80</sup> the arbitral tribunal where parties fail to reach an agreement. In whichever case however, all members of an arbitral tribunal operating under the auspices of the ICC Rules require to be confirmed<sup>81</sup> by the Court. The ICC Court directs an arbitral tribunal's conduct of the arbitration process to ensure compliance with the rules of arbitration.<sup>82</sup> It monitors the progress of the arbitration proceedings and is therefore able to extend time frames where such extensions are justified.<sup>83</sup> It fixes the fees<sup>84</sup> of the arbitral tribunal and scrutinizes awards.<sup>85</sup> To state that the Court administers the arbitration process almost in whole would therefore not be far fetched.

The ICC Rules establish an arbitral tribunal's authority and regulate the course of the arbitration process<sup>86</sup> from receipt of the request to arbitrate<sup>87</sup>, to the approval of the arbitral award as to its form.<sup>88</sup> This is however not the case with the non-institutional arbitration rules<sup>89</sup> such as the UNCITRAL Rules.<sup>90</sup> The UNCITRAL Rules are party

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<sup>80</sup> Article 8 of the ICC Rules

<sup>81</sup> *ibid*, Article 9

<sup>82</sup> *op cit*, Article 5(2), Appendix II

<sup>83</sup> Article 32(2) of the ICC Rules

<sup>84</sup> *ibid*, Article 30

<sup>85</sup> *ibid*, Article 27

<sup>86</sup> Rowley (2006: xii)

<sup>87</sup> *op cit*, Article 4(1)

<sup>88</sup> *ibid*, Article 27

<sup>89</sup> Joseph (2005: 101): "An arbitration which is not an institutional arbitration is often referred to as an ad hoc arbitration."

driven with the arbitral tribunal directing the course of the arbitration proceedings whenever it is permitted to do so by the parties to the arbitration agreement. Parties that choose to have their arbitration agreement governed by the UNCITRAL Rules are free to modify the rules to suit their particular circumstances, subject to Article 1(2), which requires the parties to pay strict adherence to the mandatory law “*applicable to the arbitration.*”<sup>91</sup> It is every arbitral tribunal’s responsibility and obligation to give effect to the wishes of the parties by exercising its powers in accordance with those wishes.

The ICC and the UNCITRAL Rules provide the procedure, which arbitration proceedings governed by those rules follow. By ascertaining the procedure, the framework within which an arbitral tribunal is able to operate is established and consequently the extent to which its powers may be exercised. The exercise of power within this jurisdictional framework that is determined by the procedure is subject to the essential provisions of an applicable law whether mandatory or not. Consequently, where the *lex arbitri* contains an essential provision on the required procedure that is contrary to the provisions of the rules of arbitration, the mandatory provision will prevail.<sup>92</sup>

## 1.2 A Foreign Investor’s Acceptance of a Standing Offer to Arbitrate

### Established under a Bilateral Investment Treaty (BIT)

An arbitration agreement that is commenced by virtue of a BIT is not the ordinary arbitration agreement that has been discussed above. The arbitration under a BIT arises from a treaty between nations. It is one of these nations with an investor from another member country that makes an offer to arbitrate to the investor. When the investor takes up the offer to arbitrate, it is deemed to be an international commercial arbitration. A

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<sup>90</sup> Caron (2006: 21): “The UNCITRAL Rules are highly adaptable for resolution of various types of disputes.”

<sup>91</sup> Article 1(2) of the UNCITRAL Rules

<sup>92</sup> [http://www.uncitral.org/pdf/english/texts/arbitration/m/-arb/06-54671\\_Ebookpdf](http://www.uncitral.org/pdf/english/texts/arbitration/m/-arb/06-54671_Ebookpdf) : page 16, paragraph 6: “The expectations of the parties as expressed in a chosen set of arbitration rules.....may be frustrated, especially by a mandatory provision of the applicable law... Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.”

standing offer in a BIT does not establish an arbitration agreement until a foreign investor exercises his autonomy and agrees to arbitration and gets the arbitration underway. Only when a foreign investor accepts a standing offer under a BIT and resolves to arbitrate may an arbitration agreement become established. In the absence of a foreign investor's acceptance of a standing offer to arbitrate, there can be no arbitration agreement under a BIT. The standing offer therefore enables a non-party to a BIT to be able to utilize the method of arbitration agreed to by the parties to the BIT even when the foreign investor is himself not a party to the BIT. By accepting the standing offer, the foreign investor becomes a party to the arbitration agreement whose terms may have been agreed to by the State of which the investor is a national.

A number of trading nations enter into a network of BITs mainly to encourage and promote cross border trade and investment in order to foster economic growth in their respective countries. The first BIT was concluded in 1959 between Pakistan and Germany. Latin America and the Caspian region have seen a rise in arbitrations established by foreign investors accepting standing offers in BITs. Most BITs that choose arbitration as a method of resolving trade disputes usually contain a clause giving a standing offer to arbitrate that may be offered to a foreign investor of a member country to a treaty. The standing offer to arbitrate if accepted by a foreign investor, gives the investor an option of resolving his dispute using the process of arbitration in the event of a dispute arising. This is possible in cases where the BIT has made provision for arbitration as one of the means of resolving disputes available to a foreign investor that wishes to establish his rights and obligations in his investment project. The arbitration agreement in such a BIT therefore only becomes established and effective if it is chosen as a dispute resolution option by a foreign investor.

Under a standing offer to arbitrate offered by a BIT and administered by ICSID for instance, an arbitral tribunal's powers and duties may be established by the Additional Facility Rules.<sup>93</sup> Where one party to an arbitration agreement is a member State and

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<sup>93</sup> ICSID/11 April 2006 - Additional Facility Rules



signatory to the Washington Convention<sup>94</sup> the parties have the option of choosing the Additional Facility Rules to govern the arbitration proceedings.<sup>95</sup> Whilst the United States of America is a signatory to the Convention for example, jurisdictions such as Canada are not. As such a Canadian<sup>96</sup> investor may accept a standing offer under a BIT and be able to access the services of the Centre's Secretariat if the other party to the dispute is American. The access to the Secretariat for purposes of administering an arbitration agreement is subject to the Secretary General's consent.<sup>97</sup> Under such arbitration proceedings an arbitral tribunal's powers are sourced from the Additional Facility Rules.

By analyzing the elements that make up the arbitration agreement, one must be able to identify the parties to the arbitration agreement; the arbitral tribunal; the subject matters in dispute; the applicable law and the governing rules of arbitration. By so doing, the extent of the tribunal's jurisdiction and powers are established. Having established the means by which an arbitral tribunal's jurisdiction and powers may be ascertained, an arbitral tribunal that confirms its willingness to work under that arbitration takes charge and becomes a master of the arbitration procedure. The acceptance of an appointment must effectively enable each arbitrator to have an answer to two crucial questions being:

- What is the nature of the dispute that the parties want me to resolve?
- What remedies am I permitted to award?

The answer to these two questions may assist in ensuring a link between the agreement of the parties to arbitrate and the dispute itself so that the arbitral tribunal is certain that the dispute before it is covered by the agreement of the parties. Further an answer to these questions enables the tribunal to know the scope of authority and jurisdiction that the arbitration agreement has provided for it.

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<sup>94</sup> *Metalclad Corporation and The United Mexican States*, ARB (AF)/97/1 – Footnote 1 “...a disputing investor may submit its claim to arbitration under the Additional Facility Rules of ICSID provided that either the disputing Party whose measure is alleged to be a breach... or the Party of the investor ...but not both, is a party to the ICSID Convention...”

<sup>95</sup> *op cit*, Article 2

<sup>96</sup> Canada is not a signatory of the Washington Convention

<sup>97</sup> *op cit*, Article 4



An arbitral tribunal must commit itself to observe certain fundamental obligations throughout the period of its mandate. These obligations operate hand in hand with the exercise of its powers. Just like an arbitral tribunal is given a duty to resolve a dispute by the parties to an arbitration agreement, the parties expect the tribunal to abide by certain fundamental obligations if its exercise of powers is to be recognized. Section two of this study will discuss four fundamental obligations which are; disclosure, impartiality, independence and confidentiality.

## II THE FUNDAMENTAL OBLIGATIONS OWED BY THE ARBITRAL TRIBUNAL TO THE PARTIES TO AN ARBITRATION AGREEMENT

An arbitral tribunal's assumption of office and its observance of its fundamental obligations are two sides of the same coin. The decision that an arbitrator makes to accept an appointment to serve as arbitrator in essence binds him to his fundamental obligations to exercise procedural justice in the conduct of the arbitration proceedings. One cannot exist without the other. An arbitrator that accepts an appointment places himself under an obligation to disclose any material facts that may in any way infringe upon his work to the parties. This responsibility is on going and disclosure has to be made before or as the issues arise. An arbitral tribunal is obliged to remain impartial and independent throughout its mandate. It must also ensure that it maintains confidentiality to the extent that is expected of the parties to the arbitration agreement. The fundamental obligations arise from the fact that the parties expect to be treated fairly by a tribunal that conducts itself in an independent, impartial and juridical manner. The principle of openness and fair dealing between parties to an arbitration process was discussed in the case of *Athletic Union of Constantinople v. National Basketball Association*.<sup>98</sup>

### II.1 A Tribunal's Duty of Disclosure

An arbitral tribunal owes the parties to an arbitration agreement an obligation to disclose. This obligation exists throughout the tribunal's mandate. An arbitrator whose name is

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<sup>98</sup> Footnote No. 857, (2002) 1 Lloyd's Rep. 305 at page 311,

being floated for possible appointment owes the parties to an arbitration agreement a general duty of disclosure.<sup>99</sup> At the time that an arbitrator accepts his appointment, he is obliged to make a statement of disclosure to the parties.<sup>100</sup> A statement of disclosure amounts to an assurance by the arbitrator to the parties that he has laid bare any issues that are likely to be regarded as influencing his decision making process. These issues may relate to any previous business dealings or relations that the arbitrator may currently have or may have had in the past with any of the parties. An arbitrator's duty is to make a statement of disclosure to the parties stating that he has previously dealt with or worked for either one or both of them. Thereafter, it is up to the parties to decide whether the disclosed statement is likely to infringe upon an arbitrator's determination of their rights and obligations in that particular arbitration. An arbitrator has got the option of refusing to accept an appointment if the issues in dispute connect him, his business or family interests to the dispute. In such a case an arbitrator may instead of making a statement of disclosure prefer to decline the offer of appointment.

In order for an arbitrator to be in a position to make an informed declaratory statement, he must be availed of the parties' arbitration agreement, written witness statements and any other relevant documents and information. A perusal of these documents before appointment may assist a prospective arbitrator to either accept the appointment or decline the appointment. The duty to disclose is an on-going obligation that an arbitrator should uphold throughout his term of office as the case progresses. This is because fresh evidence in the case and fresh witness statements may reveal information that may not have been previously available to the arbitrator. For example, the arbitrator may discover that one of the witnesses that a party is calling is the arbitrator's business partner. In such a case, the arbitrator should immediately make a declaration to that effect and it is up to the parties to decide whether they believe that the issues raised in the statement of disclosure place the arbitrator in a compromising position or not.

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<sup>99</sup> Binder (2005: 119): "A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence."

<sup>100</sup> *Metal Distributors (UK) Ltd v. ZCCM Investment Holdings Plc* [2005] 2 Lloyd's Law Reports 37 at page 39: "...arbitration is fundamentally a matter of and is limited by, the mutual consent of the parties."

In instances where the parties are given a statement of disclosure by an arbitrator and if either of the parties objects to the arbitrator's appointment as a result of the contents of the disclosure, then the arbitrator may not be appointed. If however the parties are not affected by the contents of the disclosure, then they may agree to proceed to appoint the arbitrator to settle their dispute. As such parties to an arbitration agreement may agree to appoint as arbitrator a solicitor who has previously acted for both parties at different times in the past as long as they believe that the solicitor is in a position to act impartially and independently in settling the dispute. An appropriate example here is the case of *Weissfisch v. Julius and others*.<sup>101</sup>

The claimant and the second defendant in the *Weissfisch*<sup>102</sup> case were brothers who had appointed the first defendant as their solicitor. The first defendant had previously been instructed to represent both brothers in their personal capacities. The parties agreed to appoint their solicitor as arbitrator and further agreed to waive their right to challenge the appointment of the arbitrator. The claimant commenced arbitration proceedings in England alleging that the agreement was void, as it had been procured by misrepresentations.

The arbitrator informed the parties that he wished to determine his jurisdiction in Geneva being the seat of the arbitration. The claimant's position was that challenging the arbitrator's breach of his fiduciary duty and the breach of his professional duty as solicitor could not be met by the agreed waiver. The judge when refusing to grant the application for an injunction sought by the claimant noted that under Swiss law the solicitor had *Kompetenz-Kompetenz* as arbitrator and was obliged to decide his own jurisdiction.<sup>103</sup> On appeal the court held that the principle of *Kompetenz-Kompetenz* sometimes required an arbitrator to be both judge and witness in his own cause.<sup>104</sup>

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<sup>101</sup> (2006) 2 All ER (Comm) 504

<sup>102</sup> *ibid*

<sup>103</sup> *ibid*, page 505, and page 512

<sup>104</sup> *ibid*, page 505

If an arbitration agreement adopts rules of an arbitration institution to govern the arbitration proceedings, the arbitrator may not only owe the parties a duty of disclosure but the institute<sup>105</sup> as well as the other members of the arbitration team. The SCC<sup>106</sup> places an obligation on an arbitral tribunal to exercise its general duty of disclosure. An arbitrator owes the parties to an arbitration process this ethical<sup>107</sup> and fiduciary duty of care. The IBA sets out general standards regarding both impartiality and disclosure. The second general standard states that:

*“...it is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator’s own point of view must lead to that arbitrator declining his or her appointment.”*<sup>108</sup>

Although arbitration practice has generally accepted that the duty of disclosure includes declaring one’s impartiality and independence one finds that most instruments that support the process of international arbitration only go as far as stating the obligation to be impartial<sup>109</sup> and independent without necessarily defining the terminologies.<sup>110</sup> The UNCITRAL Rules refer to this obligation in such a way that one is left in no doubt as to what the parties are looking for from the arbitrator. Article 9 states as follows:

*“A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality and independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.”*<sup>111</sup>

Article 7(2) of the ICC Rules states as follows:

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<sup>105</sup> Article 7(2) of the ICC Rules, Article 17(2) of the SCC Rules and Article 7 of the AAA Rules

<sup>106</sup> Article 17(2) of the SCC Rules

<sup>107</sup> The IBA Ethics for International Arbitrators

<sup>108</sup> F-07, IBA Guidelines on Conflicts of Interest in International Arbitration

<sup>109</sup> Redfern, (2004: 200): “The ICC Rules do not use the term “impartiality”, for reasons that... the drafters of the ICC Rules have preferred to express the relevant requirement in terms of independence because independence is a more objective notion. Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind, which it may be impossible for anyone but the arbitrator to check or to know when the arbitrator is being appointed...”

<sup>110</sup> Article 7(2) of the ICC Rules, Article 7 of the AAA Rules of 2001, Article 5(3) of the LCIA Rules, Article 17(2) of the SCC Rules, Article 22(b) of the WIPO Rules and, Rule 7(3) of the CPR Rules

<sup>111</sup> Article 9 of the UNCITRAL Rules

*“Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties....”*<sup>112</sup>

The duty of disclosure may be summed up as being a promise made by an arbitrator to the parties to the effect that having accepted to conduct the arbitration proceedings he will conduct himself fairly<sup>113</sup>, with diligence and skill. The promise by an arbitrator to be impartial and independent is one way of giving an assurance of fairness without a compromise on his professionalism. The statement of disclosure is necessary as the arbitral tribunal’s final award is in general regarded as final and binding on the parties.<sup>114</sup>

## II.2 Impartiality and Independence of an Arbitral Tribunal

An arbitral tribunal is mandated to work within the limits of its jurisdiction and in accordance with the fundamental principles of fair play, impartiality and independence.<sup>115</sup> Systems of law and rules of arbitration place an obligation on the arbitral tribunal to be independent and impartial. The Model Law demands that an arbitral tribunal treats the parties with equality and give each one of them an opportunity to present their case.<sup>116</sup> This is a fundamental obligation that may not be derogated from. Judge Lax when sitting in the Ontario Superior Court of Justice in the case of *Corporacion Transnacional de Inversiones, S.A. de C.V., et al. v. STET International, S.p.A. and STET International Netherlands, N.V.*<sup>117</sup> stated that the purpose of Article 18 of the Model Law was aimed at protecting a party from ‘egregious and injudicious conduct by an arbitral tribunal’ and not protecting a party from its own failures.<sup>118</sup>

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<sup>112</sup> Article 7(2) of the ICC Rules

<sup>113</sup> Footnote No. 7, Article 18

<sup>114</sup> op cit, Article 28(6): “Every Award shall be binding on the parties...”

<sup>115</sup> Footnote No. 107: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.”

<sup>116</sup> Article 18 of the Model Law: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

<sup>117</sup> CLOUT: (1999) 45 O.R. (3d) 183

<sup>118</sup> ibid



The English Act also places a mandatory responsibility on the tribunal to “*act fairly and impartially as between the parties.*”<sup>119</sup> Eminent authors have defined impartiality and independence in the context of arbitration. Dr Binder defines impartiality and independence as enunciated by M.S Donahey as follows:

*“Impartiality is the test for the lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute.”.. “Independence on the other hand, is a term that refers to the relationship between the arbitrator and the parties and indicates prior or current personal, social or business contact between them.”*<sup>120</sup>

Impartiality is a fluid principle in that it relates to a person’s attitude of mind and behaviour. Independence on the other hand “*is a necessary external manifestation of what is required as a prerequisite of that attitude and is an objective examination into the relationship between the parties and appointed arbitrators.*”<sup>121</sup> The objective test of impartiality is whether a reasonable man could conclude that the actions of an arbitral tribunal are biased or not. This test was alluded to in the case of *Porter v. Magill*.<sup>122</sup> The test was whether a “*fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*”<sup>123</sup> Bias in this case may arise in circumstances where an arbitral tribunal holds a private meeting in chambers with one of the parties in the absence of another. The party that is absent may portray such an action as bias on the part of the tribunal.

The Swedish Act,<sup>124</sup> a non-Model Law instrument, provides instances that may point to an arbitral tribunal being partial such as:

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<sup>119</sup> Section 33 of the English Act: “(1) The tribunal shall- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”

See also section 18 of India’s Arbitration and Conciliation Act

<sup>120</sup> Binder (2005: 117)

<sup>121</sup> Yu (2003: 935-967)

<sup>122</sup> [2001] UKHL 67

<sup>123</sup> *ibid*, at paragraph 103

<sup>124</sup> Article 8 of the Swedish Act



*“That the arbitrator or anyone closely affiliated with him is a party or otherwise may expect benefit or detriment as a result of the outcome of the dispute; ...”*<sup>125</sup>

An arbitral tribunal may be considered as being partial if it loses its independence. In the case of *Porter v. Magill*,<sup>126</sup> Lord Hope referred to the close relationship of independence to impartiality as was stated in the case of *Findlay v. United Kingdom*<sup>127</sup> as follows:

*“..whether a tribunal can be considered as independent, regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence...As to the question of ‘impartiality,’ there are two aspects to this requirement. First the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective view point, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect....The concept of independence and objective impartiality are closely linked.”*<sup>128</sup>

In order to be impartial and independent an arbitral tribunal must exercise fairness in its attitude towards all parties. A failure by an arbitral tribunal to abide by this obligation could lead to a party raising a personal challenge against an arbitral tribunal. The New York Convention<sup>129</sup> recognizes certain procedural unfairness that is restrictive. The Convention identifies the types of behaviour that are unfair and which may amount to a ground for refusing to recognize or enforce an arbitral award.<sup>130</sup> However, one finds that unfairness may go beyond those circumstances that are recognized by the Convention as grounds for refusing the recognition and enforcement of the award. For instance, an arbitral tribunal may be biased without being procedurally wrong. An arbitral tribunal may, whilst ensuring that all parties present their arguments, fail to be open minded or objective towards one party’s arguments. This kind of unfairness is not recognized by the Convention as a ground for refusing to recognize or enforce an arbitral award, although in a Model Law country one may argue that an arbitrator failed to act in accordance with his appointment.

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<sup>125</sup> *ibid*

<sup>126</sup> Footnote No. 122

<sup>127</sup> [1997] 24 EHRR 221, 244-245 paragraph 73

<sup>128</sup> *op cit*

<sup>129</sup> Article V(1) (b) of the New York Convention

<sup>130</sup> *ibid*, Article V

The Model Law provides a limited time frame within which a party may raise a personal challenge against an arbitrator before an arbitral tribunal. It states as follows:

*“(2)...a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal...”<sup>131</sup>*

The limitation on time within which an arbitral tribunal may entertain a personal challenge is a procedural safeguard that prevents the waste of time, and thus helps the tribunal to work within its set time limits.

Section 29(1) of the English Act<sup>132</sup> is a mandatory provision that gives qualified immunity to an arbitral tribunal in its conduct of its duties. This immunity is only available if an arbitral tribunal does not act in bad faith. It is possible for an arbitral tribunal to make mistakes whilst doing its work. For example an arbitral tribunal may in error fail to award damages where damages are due. Such an act though careless would entitle an arbitral tribunal to immunity under the English Act, if it is an act not done in bad faith. But mistakes made by an arbitral tribunal whilst acting in bad faith remove its immunity. In such a case, an arbitral tribunal may be personally liable to the party.

### II.3 An Arbitral Tribunal's Obligation to Maintain Confidentiality

The determination of the parties' position on confidentiality is a key issue that has to be addressed by the arbitral tribunal at the commencement of the arbitration and throughout the course of the arbitration proceedings. Dr Lew in his expert report in the *Esso v.*

*Plowman*<sup>133</sup> case stated that:

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<sup>131</sup> Article 13(2) of the Model Law & Footnote No. 190

<sup>132</sup> Section 29(1) of the English Act: “An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.”

<sup>133</sup> [1996] XXI Ybk Comm Arbn 137-71

*“The extent to which arbitration proceedings, the content, the nature of the dispute and all aspects of the arbitration remain confidential is, in my view, a matter of agreement by the parties.”*<sup>134</sup>

There is no general consensus on the arbitral tribunal’s obligation to confidentiality in arbitration proceedings.<sup>135</sup> Most countries prefer to be non-committal on the issue.<sup>136</sup> In the case of *In City of Moscow v. Bankers Trust*<sup>137</sup> the court held that confidentiality ought to be determined on a case-by-case basis. The Federal Arbitration Act<sup>138</sup> of the United States also makes no reference to the requirement of confidentiality.<sup>139</sup> Some Model Law countries’ arbitration laws such as Norway’s Act do not consider the arbitration proceedings or the ensuing award as confidential unless the parties specifically provide so in their arbitration agreement. Arbitration proceedings in Austria are confidential in the sense that they are not open to the public. The New Zealand Act also prohibits the disclosure of the arbitration proceedings. Spain’s Act also promotes confidentiality.

Certain arbitration rules<sup>140</sup> such as the SCC Rules require an arbitral tribunal to maintain confidentiality.<sup>141</sup> Whereas the ICC Rules requires an arbitral tribunal to take steps to maintain confidentiality during the arbitration proceedings,<sup>142</sup> a party requiring any piece of his evidence to be regarded as confidential under the WIPO Rules has to make a formal application before the arbitral tribunal stating the reasons why the evidence should be kept confidential.<sup>143</sup> On the other hand arbitration rules such as the UNCITRAL<sup>144</sup> and the CPR Rules<sup>145</sup> both require the arbitral tribunal to uphold the duty of confidentiality.

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<sup>134</sup> *ibid*

<sup>135</sup> Tweeddale (2005: 353)

<sup>136</sup> *Associated Electric & Gas Insurance Services Ltd v. European Re-Insurance Co of Zurich* (2003) UKPC

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<sup>137</sup> (2005) QBD 207

<sup>138</sup> The Federal Arbitration Act

<sup>139</sup> The South African Act does not also provide for the confidentiality of arbitration proceedings. There are also no legislative provisions governing the duty of confidentiality under the United Arab Emirates law on arbitration.

<sup>140</sup> Article 34 of the AAA Rules; Article 52 & 73-76 of WIPO and Article 30 of the LCIA.

<sup>141</sup> Footnote No. 106

<sup>142</sup> Article 20 of the ICC Rules – gives arbitral tribunals specific powers to protect trade secrets and confidential information.

<sup>143</sup> Article 52 of the WIPO Rules

<sup>144</sup> Article 25 of the UNCITRAL Rules

<sup>145</sup> Rule 17 of the CPR Rules

An arbitral tribunal's responsibility is to determine the parties' position in relation to the issue of confidentiality and work in accordance with that position. The arbitral tribunal may however, with the agreement of the parties, adopt the IBA Rules, which have a provision, which may ensure that the arbitration proceedings and the award remain confidential.<sup>146</sup> If the parties have expressly or impliedly provided for confidentiality in their agreement, the arbitral tribunal's responsibility is just to uphold it. Whilst it can be seen that most arbitral institutional rules confer the duty of confidentiality on the arbitral tribunal, most State laws pertaining to international arbitration have left this responsibility of imposing this obligation on an arbitral tribunal to the parties.<sup>147</sup>

## CONCLUSION

This chapter has discussed the background from which an arbitral tribunal's powers arise. It has also dealt with the basic standards of conduct required of an arbitral tribunal. It therefore marks the foundation of the tribunal's powers and the way in which it is expected to conduct itself during the duration of the arbitration. The arbitration agreement is recognized in this chapter as one of the pillars upon which the process of International Commercial Arbitration rests. The whole structural framework of arbitration is designed by the agreement of the parties. The parties have got an independent controlling power over how they would wish the disputes arising between them in their international commercial contracts to be resolved, and by whom. The parties' ability to privately design their own dispute resolution mechanism is one of the attractive features of arbitration. An arbitration agreement may also come about in an indirect way through an investor accepting a standing offer to arbitrate from the country in which he has invested. The existence of a treaty between his investment country and the country where he is domiciled forms the basis of the offer to arbitrate.

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<sup>146</sup> Footnote No. 107, Article 9: "The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation."

<sup>147</sup> Section 14(1) of the New Zealand Arbitration Act and Sections 22 and 23 of the International Arbitration Act of Singapore

This Chapter identified five attributes of an arbitration agreement which when read together define the roadmap of the arbitration. The study chose to begin by discussing the nature of an arbitration agreement and its attributes, as an arbitral tribunal is only able to source powers to conduct an arbitration from an arbitration agreement that is recognized as valid under the law to which the parties choose to subject it to. The validity of an arbitration agreement is characterized by it being able to meet the essential elements as required by the mandatory provisions of the applicable law and the public policy interests at the seat of the arbitration. As such the elements that one legal system may require an arbitration agreement to have, may be different from what another legal system may demand thus showing the subjectivity of party autonomy to the parties' chosen regulatory laws. In addition to the legal requirements of the attributes required by each legal system however, this study decided that the arbitration agreement must also have the attributes that were identified as essential.

The first of these attributes is the voluntary nature of arbitration which is seen from the parties' willingness and consent to subject their disputes to be resolved using the process of arbitration in a private manner. By virtue of their consent to arbitrate, the parties become bound to the terms of the agreement and may not depart from them unilaterally. As the consent specifically relates to the parties agreeing to have their disputes resolved by an arbitral tribunal using the process of arbitration, it may only extend to the stage when a tribunal makes its final award. Chapters five and six of the thesis will show that a party that makes an application before a court either during the course of the arbitration process or after an arbitral award is made, is not bound by the consent requirement and is therefore able to make applications even in the absence of the other party if permitted to do so by the procedural law or the law of the country where enforcement is sought respectively.

The second attribute is the independent power of the parties through their arbitration agreement to appoint an arbitral tribunal or designate a method by which the tribunal is to be appointed. The method that may be used if parties fail to agree under the Model Law does not permit an appeal from a decision of a court. Under the English Act, an appeal is



permitted but with the leave of the court. These restrictions assist the speed of the arbitration process. Also, the tribunal's involvement in the appointment of other arbitrators is maintained at a minimal level in order to promote party autonomy. Although the parties have the autonomy to choose any number of arbitrators subject to the procedural law, the trend in practice favors an uneven number of arbitrators with one or three being the most common. This enables the presiding arbitrator to have a casting vote in the event of a tie.

The existence of an international commercial contract between the parties was identified as the third essential attribute in the study, as it is from the need to establish the parties' rights and obligations emanating from their contract that led to the need to draw an arbitration agreement as the basis upon which the arbitral tribunal would have the disputes resolved. By virtue of the parties' agreeing to have a defined legal contract, a party may seek the protection of an agreed legal system when his rights are infringed or in the event of non-performance by the other party.

The fourth attribute was the need for the subject matter in dispute to be clear and precise in the arbitration agreement in order for an arbitral tribunal to know the kind of dispute that it was to deal with. The subject matter in dispute ought to firstly be arbitrable under the law to which the parties choose to subject it to and secondly, be within the scope of the arbitration agreement. The arbitral tribunal must be capable of being able to identify the issues in dispute between the parties and in this way be able to determine the extent of its jurisdiction. The fifth element that the study identified as essential in an arbitration agreement was the separate nature of the arbitration agreement from the parties' contract, which enables the two instruments to be measured using different benchmarks. This fifth element is the basis upon which an arbitral tribunal is able to interpret the parties' contract including issues relating to the validity of the contract.

These attributes are essential as they assist in defining the scope of the arbitration agreement and the extent of the jurisdiction within which an arbitral tribunal is to function. Further the attributes also show that parties to a contract are able to draw a



number of arbitration agreements with different sets of tribunals assigned to deal with different aspects of a dispute between the parties at any given time. The parties are obliged to ensure that the arbitration agreements that they draw conform to the legal system that they wish to subject their arbitration to if the validity of the agreements is to be assured.

This study also showed how the written form of an arbitration agreement required by the English Act and the Model Law has a wide connotation that may include oral agreements as well. The instruments recognize an oral arbitration agreement whose terms are reduced to a written form as satisfying the 'written form' requirement. In the same vein, a reference to the oral agreement in the terms of a contract or in a pleading that is not disputed by the other party satisfies this requirement. Complications may however not be ruled out when a party whose arbitration agreement is oral but becomes recognized as a written agreement by virtue of its reference in a statement of claim, wishes to obtain the enforcement and recognition of the final award. In order to satisfy the requirements of Article IV(1)(b) of the New York Convention<sup>148</sup> the parties' arbitration agreement must be presented as a written document.

Each arbitrator is under an obligation to ensure that it reaches the threshold of the standard of behaviour befitting of a person conducting juridical duties. This obligation may be achieved by a party upholding the principles of disclosure, impartiality, independence and maintaining confidentiality to the extent required by the parties. This is fundamental as the arbitrator exercises his procedural duties. The adherence to these principles prevents personal challenges on the arbitrator by a party.

The New York Convention does not provide recourse to a party that seeks to challenge the recognition of an arbitral award where the arbitrator is biased without being procedurally wrong. In such a case, a party may seek remedy from local laws in Model Law countries for instance. Time limits within which to raise personal challenges are used as a tool to restrict such challenges, thus ensuring that the tribunal keeps to time.

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<sup>148</sup> Footnote No. 894, Article IV(1)(b)

The English Act acknowledges that an arbitral tribunal may err in its work and therefore gives it immunity from liability subject to it not acting in bad faith. Each legal system takes a stand on the requirement of confidentiality. The parties may also agree on their position on confidentiality. The parties have an independent controlling power on the question of confidentiality in general. The fact that most systems of law tend to be silent on this issue in general boosts the parties' autonomy in this regard.

## CHAPTER TWO

### AN ANALYSIS OF AN ARBITRAL TRIBUNAL'S POWERS DURING THE CONDUCT OF THE ARBITRATION PROCEEDINGS

#### INTRODUCTION

The first chapter in this thesis has provided a perspective of the source from which an arbitral tribunal draws its legal rights, and authority to deal with a dispute between the parties to an arbitration agreement.<sup>149</sup> The aim of this chapter and chapter three is to discuss the powers of an arbitral tribunal during the conduct of the arbitration proceedings<sup>150</sup> and when making an arbitral award respectively.<sup>151</sup> As was seen in the previous chapter, an arbitral tribunal is recognized in this study as having the mandate to perform these functions. It will be evident in this chapter that the powers and duties of an arbitral tribunal are two sides of the same coin as the two are correlated in the sense that the duty of resolving the disputes between the parties determines the powers that a tribunal may exercise.

This chapter will show that although the parties hand over the baton of power to an arbitral tribunal to deal with the disputes once it is appointed, the parties do not hand over the power relating to the procedural mechanism of the arbitration process. This enables the parties to continue to have autonomy over the arbitration proceedings. In this way the parties are still in control of the means by which their dispute is resolved. The strategy that the parties adopt in planning how their dispute will be handled is, firstly for the tribunal to resolve the issues in dispute between them and, secondly, for the parties to direct the arbitration proceedings so that the work of the tribunal is completed in time.<sup>152</sup> Consequently, as the discussion will show, any procedural assistance that the arbitral tribunal may wish to draw from other procedural rules must be agreed to by the parties to

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<sup>149</sup> Statsky (1985: 588)

<sup>150</sup> Section 38(1) of the English Act: "The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings."

<sup>151</sup> Article 1(2) of the New York Convention

<sup>152</sup> *op cit*, Section 40

the arbitration agreement. Equally, an arbitral tribunal may only exercise procedural powers in the arbitration process, in a limited way and with the consent of the parties.

The chapter is made up of three sections. The first section deals with the procedural powers that the parties permit an arbitral tribunal to exercise. The second section concentrates on the power of an arbitral tribunal to establish the facts of the case between the parties to an arbitration agreement. The discussion in the first and second sections herein will draw a distinction in the way in which an arbitral tribunal exercises the procedural powers and its direct power of resolving the disputes between the parties to an arbitration agreement. The third section discusses the extent of an arbitral tribunal's powers to extend time limits during the arbitration proceedings.

## I AN ANALYSIS OF THE PROCEDURAL POWERS THAT AN ARBITRAL TRIBUNAL MAY EXERCISE IN THE ARBITRATION PROCESS

A party that is appointed to deal with the issues in dispute between the parties is given the ultimate power to resolve the dispute and make a final award. However, the procedural mechanism that it uses to resolve the dispute remains under the control of the parties. In so doing, the parties remain in control of the means by which their dispute is resolved.

The Model Law states that:

*"....the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."<sup>153</sup>*

The parties therefore have the autonomy to decide every aspect of the arbitration proceedings, beginning with the commencement date of the arbitration proceedings<sup>154</sup>, the order for directions of pleadings<sup>155</sup>, the place<sup>156</sup> and language of the proceedings<sup>157</sup>,

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<sup>153</sup> Article 19 of the Model Law: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may,...conduct the arbitration in such manner as it considers appropriate..."

<sup>154</sup> *ibid*, Article 21

<sup>155</sup> *ibid*, Article 23

<sup>156</sup> *ibid*, Article 20(1): The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."

and whether the arbitral tribunal may hold oral hearings or whether it is to rely on the submitted documents.<sup>158</sup> The parties are further free to agree on the procedure to adopt in the event of a party failing to submit his part of the pleadings<sup>159</sup>, or the requirement of an expert arising.<sup>160</sup> Any procedural powers that a tribunal may exercise are subject to the agreement of the parties.<sup>161</sup> There is a further mandatory obligation for the parties to support the work of the arbitral tribunal by complying with the tribunal's case management style.<sup>162</sup>

The decision by the parties to agree on how their disputes are to be resolved may also be made indirectly by their incorporation of rules of arbitration into their arbitration agreement. By so doing, the rules of arbitration are deemed to be part of the arbitration agreement. Rules of procedure such as the ICC and the UNCITRAL Rules provide the procedure that an arbitration tribunal may follow in the conduct of the arbitration proceedings. Whilst the UNCITRAL Rules provides a detailed step-by-step arbitration procedure that a tribunal may follow in its conduct of the proceedings, the ICC Rules tends to give the tribunal a lot of leeway in the choice of procedure.

For instance, the UNCITRAL Rules permits the tribunal to conduct the arbitration proceedings "*in such manner as it considers appropriate.*"<sup>163</sup> But this freedom is curtailed in the sense that it must be exercised subject to the procedure provided by the rules. The positive aspect of the rule is that an arbitral tribunal does not have to guess the procedures that the parties want it to follow, thus making the procedure less daunting. An arbitral tribunal may exercise discretion and obtain evidence through oral hearings or documents only subject to a party requesting otherwise.<sup>164</sup> The ICC Rules on the other hand enable an arbitral tribunal to be flexible in the sense that it is permitted to choose any rules of procedure where its rules are silent, or when the parties are unable to reach

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<sup>157</sup> *ibid*, Article 22

<sup>158</sup> *ibid*, Article 24

<sup>159</sup> *ibid*, Article 25

<sup>160</sup> *ibid*, Article 26

<sup>161</sup> Section 1(b) of the English Act

<sup>162</sup> Footnote No. 152

<sup>163</sup> Article 15(1) of the UNCITRAL Rules

<sup>164</sup> *ibid*, Article 15(2)

an agreement on the procedure to adopt.<sup>165</sup> An arbitrator therefore gets an opportunity to add value to the arbitration process as he is given a chance to draw wisdom from his past experiences and good conscience. Considering that the ICC Court almost wholly administers the arbitration process and monitors it keenly<sup>166</sup>, the chance of an arbitral tribunal abusing the procedural latitude is most unlikely.

Although there is uniformity between the UNCITRAL and the ICC Rules on the need to permit the arbitral tribunal to have a say in the procedure by which the proceedings are to be conducted, there is no uniformity on the arbitration procedure itself. This is as it should be as laying out a distinct arbitration procedure in every set of arbitration rules would amount to robbing the process of international commercial arbitration of its liberal attributes, and flexibility which are some of the features that attract parties to international commercial contracts to the arbitration process.

Where parties select an arbitration institution to govern the arbitration proceedings, the life span of that arbitration process may be determined by the institutional rules of arbitration which generally give the arbitral tribunal wide ranging powers to decide its road map and assist it to expedite the proceedings by providing procedures available to prevent undue delay. The ICC Rules for example require that an arbitral tribunal once appointed makes its final award within a period of six months, unless circumstances arise that would necessitate either the ICC Court or the arbitral tribunal on its own motion to extend the period.<sup>167</sup> Under the ICC Rules an arbitral tribunal is allowed to establish its own timetable on how it may proceed and in so doing may proceed with its work even in situations where one of the parties refuses to sign the terms of reference or does not attend hearings.<sup>168</sup> The arbitral tribunal is also empowered to avoid delaying tactics by being able to block new claims that are submitted after the terms of reference have been

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<sup>165</sup> Article 15(1) of the ICC Rules: "The proceedings before the Arbitral Tribunal shall be governed by these Rules, and where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

<sup>166</sup> *ibid*, Article 1(2)

<sup>167</sup> *ibid*, Article 24

<sup>168</sup> *ibid*, Article 18



signed.<sup>169</sup> The rules also act as a control mechanism to discourage complacency among the members of the tribunal.

### 1.1 An Arbitral Tribunal's Power to Hold a Preliminary Meeting

The holding of a preliminary meeting is one of the issues in the conduct of the arbitration proceedings that an arbitral tribunal may address. The resolution of this issue is key to the arbitration process, as it enables the parties and the tribunal to have the opportunity of agreeing on the procedural direction of the arbitration proceedings. The essence of the power of an arbitral tribunal to hold preliminary meetings as the case progresses is to enable it to gauge the case's strengths and weaknesses. The beginning of the arbitration proceedings or a change in circumstances may necessitate the holding of a preliminary meeting to enable the parties become aware of the course of action that the arbitral tribunal intends to assume.

The power to hold a preliminary meeting enables an arbitral tribunal to design its own case management style, subject to the "*right of the parties to agree any matter.*"<sup>170</sup> A preliminary meeting that is held at the commencing of an arbitral tribunal's work<sup>171</sup> is particularly helpful in the sense that all parties have a clear understanding of the method that is most suitable for the arbitration proceedings to assume. In *ad hoc* arbitrations, the arbitral tribunal may have the initial task of preparing an order of proceedings, or a timetable that the proceedings may be conducted by. The proposed timetable may be tabled before the parties who may also wish to comment and add their own suggestions. This is an opportune time for the arbitral tribunal to propose an amicable settlement to the parties, if the facts before the tribunal at this stage of the proceedings show that there could be a possibility of settlement or conciliation.<sup>172</sup>

The consideration of an amicable settlement may also be raised at any time during the course of the arbitration proceedings, but before a final award is made. If the parties are

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<sup>169</sup> *ibid*, Article 19

<sup>170</sup> Section 34(1) of the English Act

<sup>171</sup> Tweeddale (2005: 276)

<sup>172</sup> Article 34(1) of the UNCITRAL Rules

in agreement with a proposal for settlement or conciliation, there may then be no need for the arbitration proceedings to progress further. This practice is acceptable under the Model Law<sup>173</sup> and in some non-Model Law countries. Examples are England,<sup>174</sup> The People's Republic of China (PRC),<sup>175</sup> and Scotland.<sup>176</sup> It may sometimes not be necessary for the arbitral tribunal to meet the parties physically for a preliminary meeting more so if they are in different parts of the world. The arbitral tribunal may therefore with the agreement of the parties communicate through the use of electronic media or video conferencing.

An arbitral tribunal may at the commencement of its work hold a preliminary meeting in order to identify a common ground in relation to procedural and evidential issues such as the determination of the subject matter in the dispute; the venue/s of the hearings; the language to be used; the parties' position on the question of confidentiality; the parties' position on documents to be submitted; the format of the hearings and receipt of evidence and; the acceptable time scales.<sup>177</sup> The arbitral tribunal may also discuss the issue of costs with the parties at this preliminary stage of the arbitration proceedings. This is also an opportune time for the parties and the arbitral tribunal to agree on a set of rules of evidence if need be.

An arbitral tribunal's exercise of its power to hold a preliminary meeting may be exercised at any stage of the arbitration proceedings when there is a change in circumstances<sup>178</sup> and not only at the beginning of its work. The reason for this is that any

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<sup>173</sup> Article 30(1) of the Model Law: "If during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on the agreed terms."

<sup>174</sup> Section 51(1) of the English Act

<sup>175</sup> Article 18 of the PRC Arbitration Law

<sup>176</sup> Footnote No. 7, Article 30

<sup>177</sup> Section 34(2) of the English Act: "Procedural and evidential matters include- (a) when and where any part of the proceedings is to be held; (b) the language or languages to be used in the proceedings...; (c) what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended; (d) whether any and if so which documents ...should be disclosed ...and produced... and at what stage; (e) whether any and if so what questions should be put to and answered by the respective parties...; (f) whether to apply strict rules of evidence ...; (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law; (h) whether and to what extent there should be oral or written evidence or submissions."

<sup>178</sup> Footnote No. 156

changes in the agreed course of the arbitration proceedings may require the arbitral tribunal, in agreement with the parties, to re-strategize on how it is going to proceed. In the case of *Waste Management Inc. v. United Mexican States*<sup>179</sup> although the tribunal had no role in appointing a new arbitrator, it still had the responsibility of accepting the resignation, adjourning the arbitration proceedings and informing the Secretary General of ICSID to necessitate the appointment of a new arbitrator.<sup>180</sup>

Arbitration Rules in general give an arbitral tribunal the power to design the most suitable approach of conducting the proceedings and the gathering of evidence subject to the agreement of the parties.<sup>181</sup> The LCIA Rules do not however specifically empower arbitrators to hold preliminary meetings,<sup>182</sup> but in designing the most suitable approach of conducting proceedings, an arbitral tribunal may with the agreement of the parties hold a preliminary meeting if it is convinced that it is an effective management tool that may benefit the arbitration. The ICC Rules permit an arbitral tribunal to establish its procedural timetable by drawing Terms of Reference that must be signed by the parties and the arbitral tribunal,<sup>183</sup> or approved by the Court.<sup>184</sup>

The fact that the decisions arising from a preliminary meeting of an arbitral tribunal are made in consultation with the parties to the arbitration agreement<sup>185</sup> implies that a party may not unilaterally act in disregard of the parties' views in relation to an issue being discussed in the preliminary meeting. Equally, the tribunal may not just consult one party's views and disregard the views of the other party. A party may for example agree, by virtue of consenting to be governed by a set of arbitration rules, to waive certain rights that are permitted by the procedural law. Such a decision may only be changed by the agreement of all parties. In the *Lesotho Highlands*<sup>186</sup> case, the parties agreed to waive

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<sup>179</sup> ARB (AF)/98/2

<sup>180</sup> [http://www.worldbank.org/icsid/cases/waste\\_united\\_eng.PDF](http://www.worldbank.org/icsid/cases/waste_united_eng.PDF)

<sup>181</sup> Article 15(1) of the UNCITRAL Rules

<sup>182</sup> Article 14(1) of the LCIA Rules

<sup>183</sup> Article 18 of the ICC Rules

<sup>184</sup> Footnote No. 19

<sup>185</sup> Buhler (2005: 249): "...the Tribunal will consult with the parties prior to establishing the procedure."

<sup>186</sup> [2005] 2 All ER 265 at page 268

their right of appeal that was available to them under Section 69 of the English Act<sup>187</sup> by agreeing to have their arbitration proceedings governed by the ICC Rules.<sup>188</sup>

A party may however make a unilateral application relating to a preliminary issue that is not covered by any agreed terms of the parties. In the case of the *Republic of Kazakhstan v. Istil Group Inc.*<sup>189</sup> the court decided that there was “*nothing in the agreement to prevent Istil from seeking further security in the event of a material change of circumstances.*” There is an implied obligation upon the parties and the tribunal to abide by the agreed course of conducting the arbitration proceedings.<sup>190</sup> There may however be unforeseen circumstances that arise that may be beyond a party’s competence, thus making him unable to abide by the agreed terms in the preliminary meeting.

An example of such a circumstance is the illness of a party that makes him be unable to attend hearings or submit documents in time. In such circumstances and depending on the health issues of the party having been communicated to the tribunal and the other party in time, the tribunal may exercise its discretion unilaterally to change the originally agreed timescales of attendance or submission of documents. If an arbitrator fails to exercise this power after having received evidence of the party’s illness and therefore proceeds with the arbitration proceedings, the party may raise a challenge in court. In the case of *Kanoria and others v. Guinness*<sup>191</sup> the court set aside the order for enforcement against the first defendant as he was unable to participate in the arbitration proceedings and was therefore unable to present his case due to the fact that he was ill at the time. The arbitral tribunal proceeded with the arbitration proceedings inspite having been informed by the first defendant that he had undergone surgery and was convalescing at home. The appellant’s appeal was dismissed.

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<sup>187</sup> Section 69(1) of the English Act: “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.”

<sup>188</sup> *op cit*

<sup>189</sup> [2006] 2 All ER (Comm) 26 at page 26

<sup>190</sup> Section 34(3) of the English Act: “The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).”

<sup>191</sup> [2006] 2 All ER (Comm) 413

From the discussion above, it is evident that the power of an arbitral tribunal to hold a preliminary meeting is a procedural power that an arbitral tribunal exercises in the first instance. The only qualification is that the exercise of the power is not independent in the sense that it is exercised jointly with the parties to the arbitration agreement. This is as it should be, considering that the parties do not give an arbitral tribunal the power to determine the arbitration procedure outrightly as it does with the power to resolve the dispute. Although the tribunal holds the upper hand in directing the preliminary meeting, the involvement of the parties works to the advantage of the tribunal and the parties themselves in that everyone is agreed on the direction of the arbitration proceedings. This in effect helps speed up the arbitration proceedings. In deciding the arbitration procedure, the parties and the arbitral tribunal have got the responsibility of ensuring that there is conformity of the mandatory provisions at the *lex arbitri*.

## 1.2 The Power of an Arbitral Tribunal to Determine the Language of the Arbitration Proceedings

The determination of a language that is to be used in the arbitration proceedings is fundamental to the process of international commercial arbitration as it enables the parties to present their cases as well as follow the arbitration proceedings. This is the only means by which procedural justice in the arbitration proceedings may be achieved. The New York Convention as a leading treaty in international commercial arbitration demands that parties be given an opportunity of presenting their cases failing which the recognition and enforcement of the arbitral award may be refused.<sup>192</sup> In order for an arbitral tribunal to be able to meet its fundamental obligation of fairness and impartiality in the arbitration proceedings<sup>193</sup>, the proceedings must be conducted in a language or languages that all parties are happy with. Where the parties fail to reach a compromise, an interpreter may be used to translate the proceedings. Further, documents that are in another language other than that which has been chosen as the language of the arbitration may also have a translated version attached.

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<sup>192</sup> Article V(1)(b) of the New York Convention

<sup>193</sup> Section 33 of the English Act



Under the Model Law<sup>194</sup> and the English Act<sup>195</sup>, the determination of the language to be used in the proceedings is the responsibility of the parties. The Model Law gives the parties the freedom to exercise their autonomy<sup>196</sup> by selecting a language of their choice to be used in the arbitration proceedings. Under both the Model Law<sup>197</sup> and the English Act<sup>198</sup> however, an arbitral tribunal may only exercise the power to determine the language of the arbitration proceedings as a residual power, when the parties choose to transfer the power to the tribunal, or when they fail to agree. Dr Binder has stated that it is not in all circumstances that the parties might be in agreement of a language to be used in the arbitration. He also takes the position that *“the determination of the language of the arbitration is vital in international commercial arbitration.”*<sup>199</sup>

The UNCITRAL Rules require that the language be determined promptly.<sup>200</sup> Under both the UNCITRAL and the ICC Rules, an arbitral tribunal has got the residual power to determine the language of the arbitration which power is only exercisable in the event of the parties failing to reach an agreement. The ICC Rules<sup>201</sup> give power to an arbitral tribunal in the absence of the parties’ agreement to determine the language<sup>202</sup> to be used in the arbitration. This power of the arbitral tribunal is usually exercised whilst taking into consideration the language of the contract<sup>203</sup> between the parties. The language of the contract is an appropriate guide as that may be the language that the parties may have initially used to communicate in their business transactions.

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<sup>194</sup> Article 22(1) of the Model Law: “The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings...”

<sup>195</sup> Section 34(1) – (2) of the English Act

<sup>196</sup> A/CN.9/233

<sup>197</sup> Footnote No. 194

<sup>198</sup> Section 34(2) of the English Act

<sup>199</sup> Binder (2005: 200): “This language, however, does not necessarily have to be the one preferred by both parties for dispute settlement proceedings; therefore, a provision which regulates the determination of the language of the arbitration is vital in international commercial arbitration.”

<sup>200</sup> Article 17(1) of the UNCITRAL Rules

<sup>201</sup> Article 16 of the ICC Rules: “In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.”

<sup>202</sup> Article 17(1) of the LCIA Rules

<sup>203</sup> A/CN.9/264, Article 22, paragraph 4

Once the language is ascertained, an arbitral tribunal has a responsibility of ensuring that any statements or documents that are submitted which are written in another language have a translation attached. UNCITRAL qualifies this position by permitting the submission of a translation of only the portions of a voluminous document that are relevant to the dispute.<sup>204</sup> The determination of how the translations are to be handled depends upon the applicable rules of arbitration<sup>205</sup> under which the arbitration proceedings are being conducted subject to what the *lex arbitri* permits.

The language that is chosen by the parties or by the tribunal in agreement with the parties is the same language that the tribunal uses in drawing up the arbitral award. Since the enforcement of an arbitral award in international commercial arbitration is the prerogative of a court in the enforcing State, a court may want the award to be submitted in the official language of the enforcing State. The parties may therefore in some instances be required to submit translations of the arbitral award in support of their application for enforcement in the enforcing State. This position is recognized under the Model Law.<sup>206</sup>

The determination of the language to be used in the arbitration proceedings is a procedural issue that is under the control of the parties to an arbitration agreement. An arbitral tribunal is only able to exercise this power in circumstances where parties choose to transfer it to it or when the parties fail to reach an agreement. Where the tribunal is permitted to determine the language of the arbitration proceedings, it will make the arbitral award in the language agreed to by the parties with translations attached where necessary.

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<sup>204</sup> *ibid*, paragraph 5: ...the major exceptions were voluminous documents as only a part of the document would be truly relevant to the dispute.

<sup>205</sup> Article 17(2) of the UNCITRAL Rules

<sup>206</sup> A/CN.9/592, paragraph 80: "It was agreed that paragraph (2) of article 35 be redrafted as follows: "The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language."

### 1.3 The Power of an Arbitral Tribunal to Select the Seat and Venue of the Arbitration

The selection of the venue of the arbitration and the juridical seat of the arbitration are both like the determination of the language of the arbitration proceedings, procedural matters. The Model Law uses the term 'place' to refer to both the juridical seat of the arbitration and the venue at which arbitration proceedings take place.<sup>207</sup> The English Act however differentiates the seat of the arbitration<sup>208</sup> from the venue where the proceedings are held.<sup>209</sup> This study uses the term 'seat' to refer to the juridical seat of the arbitration and the term 'venue' to refer to the forum where the arbitration proceedings are held. The seat of the arbitration is defined as follows:

*"... "seat of the arbitration" means the juridical seat of the arbitration designated-*  
*(a) by the parties to the arbitration agreement, or*  
*(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or*  
*(c) by the arbitral tribunal if so authorised by the parties,*  
*or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."*<sup>210</sup>

From this definition it is apparent that the power to determine the seat is vested in the parties. The arbitral tribunal may be permitted to exercise this power by the parties where they choose to do so.<sup>211</sup> In the case of *Cie Tunisienne de Navigation SA v. Cie d'Armement Maritime SA*,<sup>212</sup> the court stated *inter alia* that:

*"An express choice of forum by the parties to a contract necessarily implies an intention that their dispute shall be settled in accordance with the procedural law of the selected forum..."*<sup>213</sup>

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<sup>207</sup> Footnote No. 156

<sup>208</sup> Section 3 of the English Act

<sup>209</sup> *ibid*, Section 34(2)(a)

<sup>210</sup> *ibid*, Section 3

<sup>211</sup> Article 21 of the UNCITRAL Notes: "...If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so."

<sup>212</sup> [1971] AC 572, at page 604

<sup>213</sup> *ibid*

Where parties choose to have their arbitration governed by the ICC Rules they in essence transfer the power to choose the seat of arbitration to the institute, although the power to choose the venue becomes vested in the arbitral tribunal when the venue is not selected.<sup>214</sup> The UNCITRAL Rules also permits an arbitral tribunal to exercise the power to determine the seat and venue of the arbitration.<sup>215</sup> The Model Law only permits an arbitral tribunal to exercise the power to select the seat of the arbitration when the parties fail to do so.<sup>216</sup> In cases where an arbitral tribunal is permitted to exercise the power to select the seat of the arbitration, it must do so whilst taking firstly, the agreement of the parties and secondly, their convenience into consideration. The tribunal's freedom to exercise this power when permitted to do so by the parties is curtailed by these two issues that it must respect.

Under the Model Law, the parties' hold on the power to determine the venue of the proceedings is however not as restrictive as it is on the determination of the seat of the arbitration. India, which is one of the countries that has adopted the Model Law, permits an arbitral tribunal to meet at a convenient geographical venue that is strategically convenient to the parties and the tribunal.<sup>217</sup> The matters that the Model Law considers as influencing an arbitral tribunal's choice of a venue are; the location of the parties, the arbitrators, the witnesses and experts and the location of goods, property or documents that may require inspection.<sup>218</sup>

Like the Model Law, the English Act does not place any restriction on an arbitral tribunal's exercise of the power to select the venue for the arbitration proceedings once the parties decide to transfer this power to the tribunal.<sup>219</sup> Lord Wilberforce stated in the case of *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd*<sup>220</sup> that:

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<sup>214</sup> Article 14(2) of the ICC Rules: "The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties."

<sup>215</sup> Article 16 of the UNCITRAL Rules

<sup>216</sup> Section 20 of the Model Law

<sup>217</sup> Section 20(3) of India Arbitration and Conciliation Act

<sup>218</sup> op cit

<sup>219</sup> Section 34(1) of the English Act

<sup>220</sup> [1970] AC 583

*“...the mere fact that the arbitrator was to sit either partly or exclusively in another part of the UK, or for that matter, abroad, would not lead to a different result; the place might be chosen for many reasons of convenience or be purely accidental; a choice so made should not affect the parties’ rights.”*<sup>221</sup>

From this discussion, it is clear that an arbitral tribunal exercises the power to select the seat and venue of the arbitration only when it is delegated to do so by the parties. The venue of arbitration does not have to necessarily be the same place as the seat of the arbitration. In the case of *Margulead Ltd v. Exide Technologies*<sup>222</sup> the sole arbitrator decided to conduct the arbitral proceedings in Chicago although the seat of arbitration was London. In the case of *Republic of Ecuador v. Occidental Exploration and Production Co.*<sup>223</sup> the arbitral tribunal chose London as the seat of arbitration but held all the meetings in Washington.

In the *Channel Tunnel*<sup>224</sup> case, although the seat of the arbitration was Brussels, the arbitral tribunal found it convenient to hold meetings in Brussels, Edinburgh and Paris. The reason for selecting only one seat is that the seat is the home of the arbitration and consequently governs the arbitration proceedings irrespective of the venue of the arbitration proceedings. Each arbitration agreement has to have a clearly defined juridical seat which should be there to provide the legal framework within which the arbitral tribunal is to function.

The English Act as well as the Model Law regulates the need for an arbitral tribunal to decide the dispute between the parties in accordance with the applicable laws.<sup>225</sup>

An arbitral tribunal may when necessary choose more than one venue in which to conduct the arbitration proceedings. Although these venues may sometimes be in different countries, the arbitration proceedings continue to be regulated by the *lex*

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<sup>221</sup> *ibid*

<sup>222</sup> (2005) 1 Lloyd’s Law Report 324

<sup>223</sup> (2006) QBD 432

<sup>224</sup> Footnote No. 61

<sup>225</sup> Section 46 of the English Act: “The arbitral tribunal shall decide the dispute- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute...”



arbitri.<sup>226</sup> In the case of *Karaha Bodas Company, L.L.C v. Perusahaan Pertambangan Minyak Dan Bumi Negara*<sup>227</sup> the parties' power project in Indonesia entered into two contracts being an energy sales contract and a finance contract. Both contracts were to be governed by the law of Indonesia. However, since Geneva was named as the seat of the arbitration, the courts in Switzerland had primary jurisdiction over the arbitration proceedings. In the case of *Wintershall, A.G. v. Qatar*<sup>228</sup> since the seat of the arbitration was The Hague the tribunal was subjected to the mandatory provisions of the Netherlands Arbitration Law. As the home of the arbitration therefore, the courts at the seat of the arbitration exercise primary control over applications such as the setting aside of the arbitral award.

The Court of Appeal in Singapore in the case of *PT Garuda v. Birgen Air*<sup>229</sup> distinguished the seat from the venue of arbitration. The court stated that whereas the arbitral tribunal could hold its hearings at different venues, the seat of arbitration had to be agreed to by the parties subject to the laws governing the arbitration proceedings. The fact that the parties and the arbitral tribunal agree to conduct the arbitration meetings at a venue other than the seat of the arbitration for the convenience of the parties, witnesses and the members of the arbitration tribunal, does not mean that the new venue becomes the legal seat of the arbitration. But all parties to an arbitration agreement as well as the arbitral tribunal are however obliged to respect all the local laws at all the venues where the arbitral proceedings are held. This does not imply that the arbitration proceedings' legality is to be determined by the laws at the venues.

If for instance an English party and a Spanish party select Paris as their seat of arbitration and Edinburgh as the venue where the arbitration proceedings are to be held, a party that disagrees with the way in which the arbitration proceedings are being conducted may raise a challenge in a French court if the parties provide for such a procedure. The

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<sup>226</sup> *Union of India v. McDonnell Douglas* [1993] 2 Lloyd's Rep. 48 at page 50 "...the fact that parties have agreed to a place for arbitration is a very strong pointer that implicitly they must have chosen the law of that place to govern the procedures of the arbitration...."

<sup>227</sup> 190 F.Supp 2d 936 (S.D. Tex., December 04, 2001)

<sup>228</sup> 28 I.L.M. 795, 801 (1989)

<sup>229</sup> (2002) 1 SLR 393

French courts may determine the challenge even if none of the sittings are held in Paris by virtue of it having been chosen as the seat of the arbitration. This was the position of the court in the ICC Case No. 10623.<sup>230</sup> The court had also earlier distinguished the seat from the venue of arbitration in the case of *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru*<sup>231</sup> when it stated that:

*“It may often be convenient to hold meetings or even hearings in other countries. This does not mean that the ‘seat’ of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time to time, unless of course, the parties agree to change it.”*<sup>232</sup>

The discussion in this part of the study has shown that the parties to an arbitration agreement do not hand over the baton of power to determine the seat and venue of the arbitration to an arbitral tribunal once it is appointed. This power remains with the parties. An arbitral tribunal may however be permitted to exercise the power to select the seat or venue of the arbitration when it is convenient to the parties or when they fail to agree. As such, whether or not an arbitral tribunal is permitted to exercise this power may be dependent upon the agreement of the parties in each case. However, once the parties do decide to delegate this power, the tribunal may only exercise power herein subject to the wishes of the parties. The role of the arbitral tribunal in the selection of the venue of the arbitration has an impact on the arbitration itself. As the tribunal observed in the ICC Case Number 1776, the procedure in international commercial arbitration depended not so much on the venue where the arbitration is conducted but more on the back ground and experience of the individual members of the arbitral tribunal and the parties’ advisers.<sup>233</sup>

#### I.4 The Power of an Arbitral Tribunal to Change the Venue of the Arbitration

The study so far shows that when parties to an arbitration agreement decide to vest the power to select the venue of the arbitration in an arbitral tribunal, the tribunal is at liberty

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<sup>230</sup> Case No. 10623 of December 7, 2001, ASA. Bull (2003) p. 59

<sup>231</sup> [1988] 1 Lloyd’s Rep. 116 at page 121

<sup>232</sup> *ibid*

<sup>233</sup> ICC Case No. 1776 (unpublished); Lew (2003:534)

to choose any venue it considers appropriate. An inference may therefore be drawn that a tribunal may exercise power and change the venue it may have chosen when circumstances change. The change of venue of the arbitration must be done on the same terms that the parties may have set when permitting the tribunal to select the venue in the first place.<sup>234</sup> An arbitral tribunal may change the venue of the arbitration either at its own instance or at the request of a party.

Before a change of venue can take place, the arbitral tribunal must ascertain firstly that all the parties are in agreement with the change of venue and secondly that the *lex arbitri* and the arbitration rules chosen to govern the arbitration proceedings provide for such course of action. Therefore in cases where the change occurs at the instance of the arbitral tribunal, steps must be taken to ensure that all the parties are aware of the change and there is no objection to the selected new venue. It is important for the arbitral tribunal to make sure that this step is carried out in order to avoid unnecessary challenges as a party may fail to attend a hearing or send witnesses simply because the new venue is unknown to him. The arbitral tribunal is therefore obliged to exercise this power fairly so that there is no infringement of any party's interests.

There are a number of reasons that may lead to a change in venue. The reasons for the change of venue must be justifiable and fair in order to avoid unnecessary challenge. In an ICC Case No. 10623<sup>235</sup> whose parties were of Italian and Ethiopian origin respectively, the arbitral tribunal decided to hold all meetings in Paris instead of Addis Ababa which was the seat of the arbitration. This was done for the tribunal's convenience and that of the Italian party. This action of the tribunal led to the challenge of the tribunal's award by the Ethiopian party. The Ethiopian party's position was that the arbitral tribunal had abused its discretionary power by making a decision to move the venue of the arbitration based on the convenience of one party. Although the Court rejected the Ethiopian party's application for challenge, the case served to show that the

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<sup>234</sup> Footnote No. 92, page 16 paragraph 8: "Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but... the selection of the place of arbitration...."

<sup>235</sup> Footnote No. 230

arbitral tribunal must take into account all circumstances of the case when deciding to move venue, including the non-legal factors such as was the case in the instant case. It is the responsibility of the arbitral tribunal to ensure that any changes in venues are in accordance with the agreement of the parties and are in agreement with the procedural law and the governing arbitration rules. This is essential if recognition and enforcement of the award is to be assured under the New York Convention.<sup>236</sup> This part of the study looks at some of the reasons.

#### 1.4(i) Change in Political Climate

A sudden change in a country's political environment may lead to a change of venue of the arbitration.<sup>237</sup> A *coup d'état* may for instance bring in a leader whose ideologies may include changes in the law that permit him to impose a state of emergency or a curfew in order to restrict peoples' freedom of movement. When such things occur, there is likely to be uncertainty in the arbitration. The parties may want to not only have the arbitration proceedings moved to another venue, but the seat of the arbitration as well. The reason for this is that the parties may fear that the hostile changes in the laws at the seat, may result in difficulty in having the arbitral award enforced. In the case of *In re Halliburton Co*<sup>238</sup> the arbitral tribunal decided that it had the power to hear an application for a change of the seat of the arbitration due to the change in circumstances that made Tehran unsuitable. In the case of *Himpurna California Energy Ltd and The Republic of Indonesia*<sup>239</sup> the claimant requested the arbitral tribunal to change the venue of arbitration as Indonesia used its power to deny the claimant effective legal representation. The tribunal ordered that the arbitration proceedings be held at The Hague. It did not however change the seat of the arbitration, which remained as Jakarta.

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<sup>236</sup> Article V(1)(d) of the New York Convention

<sup>237</sup> Comeaux (Vol. 2, No. 2 of April 1993): "Political risk is the risk of government intervention faced by a foreign investor..."

<sup>238</sup> (1982), 1 Iran-US, CTR 242

<sup>239</sup> Interim Award of 26 September 1999 and final award of 16 October 1999 – Yearbook Commercial Arbitration, Volume XXV – 2000, page 109, at page 124

A change in the political climate may also lead to the disregard of the laws and treaties pertaining to international commercial arbitration. This may result in the courts unduly interfering in the arbitration proceedings. In order to circumvent such hostile political changes, parties may agree to include a stabilization clause in their arbitration agreement that may prohibit the arbitration agreement from being affected by any political changes. In the *Aminoil*<sup>240</sup> arbitration the parties provided a stabilization clause in their arbitration agreement. The clause did not however contain express prohibitions and was therefore unable to prevent nationalization. A change in the political climate may therefore make an arbitral tribunal decide to change the venue of the arbitration proceedings. The tribunal only has power to change the seat of the arbitration when requested to do so by the parties.

#### 1.4(ii) Restrictions in the Movement of Witnesses

The venue of the arbitration may be changed when circumstances arise that prevent it from accessing witnesses. An example is a situation where witnesses are prevented from entering the country where the arbitration proceedings are taking place due to a denial of entry permission into the said country. Such a situation may require the tribunal to move the arbitration proceedings to the countries where the witnesses are domiciled in order to receive their evidence. Alternatively, the arbitral tribunal may with the agreement of the parties and in order to save costs, move the arbitration proceedings to another country whose laws are arbitration friendly. The exercise of this power by an arbitral tribunal is important as it enables the tribunal to meet its fundamental obligations of having conducted a just arbitration. A change of venue under these circumstances may prevent challenges being raised by a party whose witness fails to attend the proceedings.

#### 1.4(iii) Proximity

An arbitral tribunal may with the consent of the parties request a change of venue of the arbitration proceedings to a place that is nearer to the majority of the arbitrators. This may be done essentially to save costs in the proceedings. If for example the venue of the

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<sup>240</sup> *Government of Kuwait v. American Independent Oil Company (Aminoil)*, 21 I.L.M. 976 (1982)



arbitration is Toronto and most of the members of the arbitral tribunal reside in Europe, the parties may agree that most of the meetings be held in Paris in order to save time and travelling expenses. The arbitral tribunal may also decide to have some of the meetings at a venue that is nearest to most of the witnesses or where inspection of some sites is required.

Having looked at the reasons that may lead to a change in the venue of the arbitration proceedings, it is important to note that it is not in all circumstances that an arbitral tribunal may be obliged to change the venue of the arbitration when requested to do so by a party. For example in the ICC Case No. 10439<sup>241</sup> the arbitral tribunal refused to change the seat of the arbitration when requested to do so by an American party. The request was for a change of seat from Belgrade to Geneva due to the unsettled political climate in Belgrade that had strained the relationship between Yugoslavia and America. The arbitral tribunal decided that the parties remained bound by their choice of Belgrade as none of the members of the tribunal were from that country and the hearings could be conducted at another venue. There was therefore no need to change the seat of arbitration. A change of venue in this case would not have sufficed if the changed circumstances in Belgrade had completely altered the legal system. What would have brought justice would have been the change of the seat of arbitration.

The discussion in this section shows how party autonomy maintains a firm grip on the arbitration process during the conduct of the arbitration proceedings. This holds is the basis of arbitration. Parties to an arbitration agreement resort to the process of arbitration because it gives them the unusual opportunity to be in control of how their disputes are settled. An arbitral tribunal may only exercise procedural powers to the extent that the parties wish it to. However, as the next section will show, although the parties are in firm control of the procedural mechanism by which their disputes are resolved, they are not able to resolve the disputes themselves save for instances when they agree to an amicable settlement as discussed above. When the dispute is contentious however, the parties have

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<sup>241</sup> [2004] Rev. arb. [2004], page 413

no option but to hand over power completely to an arbitral tribunal to resolve their differences.

## II THE POWER OF AN ARBITRAL TRIBUNAL TO ESTABLISH THE FACTS IN DISPUTE BETWEEN THE PARTIES TO AN ARBITRATION AGREEMENT

The powers that a tribunal exercises when establishing the facts in dispute are different from its permitted procedural powers that have been discussed in section one. Section one showed that where parties permit an arbitral tribunal to hold preliminary meetings, it gives the tribunal the power to do so. However, an arbitral tribunal is not able to hold the meetings and arrive at a decision without taking on board the views of the parties. The parties therefore have an active role in the preliminary meetings. An arbitral tribunal is not able to choose to hold a preliminary meeting and conclude it in disregard of what the parties think. It is imperative that the parties are consulted. The parties have got the prerogative to choose to exercise the power to select the language to be used in the arbitration as well as the power to select the seat and venue of the arbitration including any changes thereto.

An arbitral tribunal is only able to exercise this power when the parties choose to permit it to do so. As such in cases where the parties choose to exercise the power themselves, an arbitral tribunal is only able to work in accordance with what the parties have decided. In the case of the power to establish the facts in dispute however, this is a duty that may only be carried out by an arbitral tribunal and not by the parties. Once appointed therefore, an arbitral tribunal is also permitted to exercise power and establish the facts in dispute between the parties. The establishment of the facts of the case is an arbitral tribunal's main duty<sup>242</sup> and the tribunal therefore exercises direct power under it.

In order to establish the facts of the case, an arbitral tribunal has to begin by identifying the basic issues in the dispute and the relief sought. It is only when an arbitral tribunal identifies the bone of contention between the parties, gathers evidence and deliberates, is

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<sup>242</sup> Article 19 of the Model Law

it able to iron out the contentious issues between the parties and provide the appropriate remedies. If for any reason there is an issue that the parties have not touched on but which the arbitral tribunal believes from experience would assist the parties in the settlement of their dispute, it is duty bound to put it before the parties in order for them to have an opportunity to comment on the issue. At least this will prevent parties reading about some issues that were never raised at the hearing in an arbitral tribunal's ruling. This was the position taken by Lord Justice Bingham in the case of *Zermalt Holdings S.A v. Nu Life Upholstery Repairs Limited*.<sup>243</sup>

The Model Law provides for the claimant to state his case and relief sought in a Statement of Claim and for the respondent to defend his case in the Defence. In either case, each party is permitted to attach documents in support of their case.<sup>244</sup> Apart from the parties' statements and exhibited documents the tribunal may also gather evidence from the opinions of experts and site inspections.<sup>245</sup> Having collected the statements, from the parties, the tribunal may choose to hear evidence or rely on documents only, or both, subject to the agreement of the parties.<sup>246</sup>

Although the Model Law provides outright power to an arbitral tribunal to establish the facts of the case, an arbitral tribunal's exercise of procedural powers such as the power to draw the order of directions and the determination of the time frame within which each act is to be performed by each party, may only be availed to a tribunal when the parties agree. The power to determine any procedural issues arising during the course of the arbitration proceedings as the tribunal establishes the facts of the case lies in the hands of the parties. For instance, if the parties had already decided in their arbitration agreement on the course to take in the event of a party wanting to make amendments to his part of the pleadings, the tribunal may not have the power to decide such a procedural issue. However, only in the absence of the agreement of the parties may an arbitral tribunal use its discretion and refuse to allow an application to amend pleadings if it is of the view

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<sup>243</sup> (1985) 2 E.G.L.R 14 at page 15: "If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment..."

<sup>244</sup> Article 23(1) of the Model Law

<sup>245</sup> *ibid*, Article 20(2)

<sup>246</sup> *ibid*, Article 24(1)

that the application has been made late and admitting it would be detrimental to the other party.<sup>247</sup>

Like the Model Law, the English Act recognizes the role of an arbitral tribunal to establish the facts in dispute in order to resolve the differences between the parties as the essence of arbitration.<sup>248</sup> It permits the tribunal to draw the order for directions including the means by which its facts may be established.<sup>249</sup> However this power may only be exercised subject to the agreement of the parties. This is aimed at maintaining party autonomy and enabling the parties to decide the procedure by which their dispute is to be resolved.<sup>250</sup> Whilst an arbitral tribunal has the ultimate power to establish the facts of a case, the parties decide the means by which the tribunal is to carry out such a duty. Under the English Act like the Model Law, an arbitral tribunal is only conferred with the power to determine the order for directions when the parties decide to do so. When this occurs, a tribunal may exercise its discretion subject to its fundamental obligations of being impartial and independent. An arbitral tribunal must further exercise care and skill when establishing the facts in dispute between the parties to an arbitration agreement.

In the case of *Taylor Woodrow Holdings Ltd and another v. Barnes & Elliot Ltd*<sup>251</sup> the court showed the role of a tribunal as being that of determining questions of fact. The English Act may sometimes permit an arbitral tribunal to determine the extent to which it may “*take the initiative in ascertaining the facts and the law*”.<sup>252</sup> Under the UNCITRAL Rules however, an arbitral tribunal is conferred with the ultimate power to not only establish the facts in dispute between the parties, but to decide the course of the arbitration proceedings. The only limiting factors are that the tribunal must treat all the parties with equality<sup>253</sup> and act in conformity with the *lex arbitri*. There are two tests that an arbitral tribunal may use to be certain of the fair treatment of the parties as it

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<sup>247</sup> *ibid*, Article 23(2)

<sup>248</sup> Section 1(a) of the English Act: “...the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.”

<sup>249</sup> *ibid*, Section 34(2)

<sup>250</sup> *ibid*, Section 1(b)

<sup>251</sup> Footnote Nos. 17 & 879

<sup>252</sup> Section 34(2)(g) of the English Act

<sup>253</sup> Article 15(1) of the UNCITRAL Rules

establishes the facts of the case. The first one is that of ensuring that all parties are adequately notified of the place, date and time of the hearings. The second one is that of ensuring that time is managed fairly by giving sufficient time to all parties to peruse the other party's documents and make a meaningful response.

The general view is that with all things being equal, an arbitral tribunal should give the parties equal time to present their case. The Model Law places a mandatory fundamental duty on an arbitral tribunal under Article 18 to treat parties with equality and to give them a “*full opportunity of presenting*” their case.<sup>254</sup> But one finds that countries like Sweden that have not adopted the Model Law, have toned down this position a little by using ‘to the extent necessary’ instead of “*full opportunity*”, thus giving finality to a case.

The ICC Rules confer power on an arbitral tribunal to establish the facts of the case through the use of “*all appropriate means*.”<sup>255</sup> In the case of *Elf Aquitaine Iran v. National Iranian Oil Co. (NIOC)*,<sup>256</sup> the sole arbitrator made a decision to determine the procedure that the arbitration was going to follow by virtue of the Exploration and Production Contract. Whichever way in which an arbitral tribunal is permitted to establish the facts in dispute between the parties, it has a duty to work within the ambit of its jurisdiction subject to what the *lex arbitri* permits.

As an arbitral tribunal is conferred with a direct power to establish facts in dispute between parties to an arbitration agreement, it must also decide the kind of evidence that it may wish to admit which evidence forms the basis upon which it is able to make its finding of fact and draw inferences for its conclusions. Any finding of fact that an arbitral tribunal may make must be supported by the agreement of the parties or by evidence. The tribunal's findings of fact and the collected evidence form the foundation upon which an arbitral award is made. The way in which an arbitral tribunal handles this phase of the proceedings is reflected in the credibility of the final award. The final award

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<sup>254</sup> Article 18 of the Model Law

<sup>255</sup> Article 20(1) of the ICC Rules: “The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”

<sup>256</sup> Preliminary Award of 14 January 1982, 11 YB Comm. Arbn, 97 [1986]



may therefore not only be as good as the arbitral tribunal, but as good as the evidence that the arbitral tribunal collects and chooses to admit. The ICC Rules permit an arbitral tribunal to request the parties for additional evidence where it is required.<sup>257</sup>

## II.1 Method of Collecting Evidence

As has been seen from the discussion above, an arbitral tribunal must collect evidence in order to establish the facts of the case between the parties to an arbitration agreement. The Model Law permits an arbitral tribunal to decide the method by which evidence may be collected.<sup>258</sup> The means of collecting evidence that the discussion hereunder focuses on are:

- Written statements and exhibits (documents only)
- Oral hearing of witnesses
- Inspection of sites
- Engaging experts

It is not unusual for an arbitral tribunal to choose to use all the above stated methods in the same arbitration if the governing laws and rules of arbitration permit it to do so. An arbitral tribunal will endeavor to select the method that may assist it most as long as the method is what the parties require and it meets the justice of the case.<sup>259</sup> Such an opportunity presents itself most in arbitration proceedings that are conducted under the ICC Rules that permit an arbitration tribunal to draw up the Terms of Reference that in essence establish the timetable for the arbitration proceedings.<sup>260</sup>

It must be stated here that it is imperative that any selected method of collecting evidence is in conformity with the agreement of the parties, the *lex arbitri* and the public policy

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<sup>257</sup> *op cit*, Article 20(5): "At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence."

<sup>258</sup> Article 24 of the Model Law

<sup>259</sup> A/CN.9/207 paragraph 17: "Probably the most important principle on which the Model Law should be based is the freedom of the parties in order to facilitate the proper functioning of International Commercial Arbitrations according to their expectations."

<sup>260</sup> Article 18 of the ICC Rules

requirements at the seat of arbitration as well as with the adopted rules of arbitration.<sup>261</sup> Where there is conflict in any of these provisions, the mandatory requirements at the *lex arbitri* and the public policy interests prevail over the agreement of the parties and the governing rules of arbitration. An arbitral tribunal has a responsibility of ensuring that the parties' exercise of their autonomy in terms of selecting the appropriate procedural method, does not override the provisions of the mandatory laws and public policy considerations at the seat of the arbitration. The mandatory laws and the public policy considerations limit the parties' exercise of their discretion to agree on the method to be adopted in the arbitration proceedings, as the provisions of the mandatory laws at the seat of arbitration usually prevail.<sup>262</sup>

## II.1(a) Assistance from Additional Rules of Evidence

In circumstances where the methods that the parties have authorized an arbitral tribunal to use are not sufficient, an arbitral tribunal may with the consent of the parties, access further powers of procedure from other sets of rules as the need arises. An arbitral tribunal may also get assistance from additional rules of evidence such as the IBA Rules on Evidence<sup>263</sup> or the UNCITRAL Notes. The adoption of either of these rules has to be done with the consent of the parties and the tribunal. These rules of evidence may be adopted in *ad hoc* arbitrations as well as in arbitrations where the parties have already adopted a set of arbitration rules to govern the arbitration. For instance, the IBA Rules were adopted in the *CME*<sup>264</sup> *ad hoc* arbitration.

The IBA Rules are particularly useful in dealing with witness evidence and document production as well as in providing common ground where the members of the arbitral tribunal are from different legal backgrounds.<sup>265</sup> They permit an arbitral tribunal to determine a method that it considers to be the most appropriate where the rules are

<sup>261</sup> Footnote No. 92, page 16 paragraph 7: "...national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures..."

<sup>262</sup> Section 1(b) of the English Act

<sup>263</sup> Adopted by the IBA Council

<sup>264</sup> *CME Czech Republic BV v. The Czech Republic* [2003] 15(4) WTAM 83, 100

<sup>265</sup> *op cit*

silent.<sup>266</sup> The UNCITRAL Notes on the other hand are helpful in identifying the type of procedural issues that may have to be resolved and in suggesting the solutions to such issues.<sup>267</sup> These are usually adopted in *ad hoc* arbitrations. The method that the arbitral tribunal chooses to adopt in collecting evidence should be directed at ensuring the fair treatment of all the parties to the arbitration agreement.

## II.1(b) The Use of Documents Only

The use of documents only is efficient and effective as it enables the arbitral tribunal to conduct the arbitration proceedings at a quick pace and save the parties costs and expenses. The IBA Rules on Evidence permits written statements as a means of collecting evidence as it saves time.<sup>268</sup> The co-operation of all the parties is required if the effectiveness of the documents only method is to be successful. In the *Himpurna*<sup>269</sup> case, Indonesia chose not to submit documentary evidence as required and did not give any reasons for its failure to do so. Such lack of co-operation causes unnecessary delay to the case.

Parties to an arbitration agreement may choose to prepare and file bundles of documents that are indexed in order to provide quick reference to documents during the arbitration proceedings.<sup>270</sup> It is also the responsibility of an arbitral tribunal to ensure that documents in its custody are kept in a secure place.<sup>271</sup> Each party is obliged to disclose to the other party the documents that it intends to rely on within the prescribed time limits. Apart from the party-to-party disclosure of documents, the UNCITRAL Rules<sup>272</sup> permits discovery to be extended to the testimonies of factual and expert witnesses of either party

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<sup>266</sup> *ibid*, Article 2(4)

<sup>267</sup> Article 43 of the UNCITRAL Notes: "In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed."

<sup>268</sup> Footnote No. 263, Article 4(4)

<sup>269</sup> Footnote No. 239, page 185

<sup>270</sup> Articles 18 & 19 of the UNCITRAL Rules

<sup>271</sup> UN Doc A/CN.9/WG.II/WP.108, para 63

<sup>272</sup> Article 27(2) of the UNCITRAL Rules

as well as to the expert witnesses that are invited by the arbitral tribunal.<sup>273</sup> Any use of the discovery process has to be agreed to by the parties.<sup>274</sup> In the event that an expert is called to make an opinion on an issue, documents must be availed to the expert by the parties.<sup>275</sup>

The parties have a responsibility of keeping to the prescribed time frames within which documents are to be filed. In instances where the arbitration rules permit, the set times of filing documents may be extended at the instance of either the parties or the arbitral tribunal. The timely exchange of documents upholds two fundamental obligations<sup>276</sup> that the tribunal owes the parties to an arbitration agreement. These are:

- The equal treatment of all parties and;
- Availing each party with an opportunity of presenting their case.

The criteria for determining a fair treatment of the parties by an arbitral tribunal tends to be subjective in that it is really dependent upon the circumstances of each case. Lord Justice Tucker in the case of *Russell v. Duke of Norfolk*<sup>277</sup> in reference to an arbitral tribunal's obligation to what entails a fair hearing stated that it would:

*'...depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.'*<sup>278</sup>

Where it is permitted, an arbitral tribunal may use its discretion and refuse to admit documents in evidence. An example of this is the production of documents that are considered as sensitive and touching on the security of a country that is selected as the seat of the arbitration. This practice is not statutory but done in the interest of the nation. Documents may also be excluded from production for being irrelevant.<sup>279</sup> In a situation where a party refuses to produce documents, the test as to whether an arbitral tribunal has

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<sup>273</sup> *ibid*

<sup>274</sup> *ibid*, Article 24(3)

<sup>275</sup> *ibid*, Article 27(2)

<sup>276</sup> A/40/17, paragraph 176

<sup>277</sup> [1949] 1 All ER 109 at 118

<sup>278</sup> *ibid*

<sup>279</sup> *ABB AG v. Hochtief Airport GmbH and another* [2006] 1 All ER (Comm) 529 at page 563

dealt with the dispute fairly in the absence of that piece of evidence, depends on the discovery procedure that is provided by the arbitration agreement.<sup>280</sup>

In the case of *National Casualty Company v. First State Insurance Group*,<sup>281</sup> the court stated that:

*“...that an arbitrator’s failure to consider evidence constitutes misconduct only when it deprives the complaining party of a fair hearing. ...the arbitral agreement was silent on discovery procedures and that the arbitrators drew a negative inference against First State for failure to produce the documents, cured any unfairness resulting from the withholding thereof.”*<sup>282</sup>

The adoption of the use of documents only as a method by which an arbitral tribunal is to collect its evidence must be provided for by the rules of arbitration that govern the arbitration proceedings. Further, the law at the seat of the arbitration must permit such a procedure and where it is permitted, caution must be exercised as to any restrictions that the law may apply on the type of documents that may be used.<sup>283</sup> As discussed above, the *lex arbitri* may be reluctant to permit the production of documents that touch on national interests in a private international commercial arbitration. The ICC Rules require that an arbitral tribunal exercise its powers in a manner that conforms to the laws at the seat of the arbitration in order for its final award to be enforceable at law.<sup>284</sup>

### II.1(c) The Power to Hold Oral Hearings

An arbitral tribunal may where it is permitted collect evidence through the use of oral evidence. There are countries whose laws provide for oral hearings of proceedings unless the parties agree not to hold such hearings. In such cases an arbitral tribunal is required to abide by the terms of the *lex arbitri*, unless the parties agree otherwise. Scotland for example, like the Model Law<sup>285</sup>, gives an arbitral tribunal the discretion to hold an oral

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<sup>280</sup> *ibid*

<sup>281</sup> Case No. 05-1505

<sup>282</sup> *ibid*

<sup>283</sup> Article 1 of the UNCITRAL Rules

<sup>284</sup> Article 35 of the ICC Rules

<sup>285</sup> Article 24(1) of the Model Law



hearing.<sup>286</sup> The English Act also permits an arbitral tribunal to decide the extent to which it may admit oral evidence.<sup>287</sup> The PRC also permits arbitration proceedings to be conducted by means of oral hearings.<sup>288</sup> The holding of oral hearings may relate to the collection of evidence from any of the following groups:

- The oral testimonies of witnesses;
- The oral submissions of the parties' representatives or;
- The oral submissions of the parties.

In situations where the receipt of evidence is permitted through oral hearings, an arbitral tribunal may exercise its discretion and apply such a procedure only to certain aspects of the dispute. For example in the case of *SEDCO, Inc. & National Iranian Oil Company*,<sup>289</sup> oral hearings were held for the sole purpose of hearing the claimant's expert witness, Mr Whitney. Parties exercise autonomy by permitting the tribunal to exercise discretion on the best procedural method it may use.

From the discussion above, it is clear that the independent right of the parties to choose the method by which an arbitral tribunal may collect evidence is embraced in most countries<sup>290</sup> as well as by the rules of arbitration referred to herein.<sup>291</sup> The parties' autonomy is limited by the mandatory obligations of Article 18 of the Model Law.<sup>292</sup> In the case of arbitrations established by virtue of an investor accepting a standing offer to arbitrate in a BIT, the limitation is placed by the obligation on the BIT members to ensure that a foreign investor is treated in the same manner as the local investors in the country where the foreign investor has investments.

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<sup>286</sup> Footnote No. 7, Article 24

<sup>287</sup> Section 34(2) of the English Act

<sup>288</sup> Footnote No. 175, Article 39 of Section 3

<sup>289</sup> Case No. 309-129-3 (7 July 1987)

<sup>290</sup> Sections 21 and 24 of the Swedish Act

<sup>291</sup> Article 15(1) of the UNCITRAL Rules

<sup>292</sup> Binder (2005: 181): "...Article 18, however restricts this freedom by making the determination of the arbitral procedure subject to the principles of party equality and equal opportunity to present one's case;..."

Where the method of oral hearing is chosen, there is usually no hard and fast rule on the length of the hearings.<sup>293</sup> It is really dependent on the arbitral tribunal's case management style. In the case of the *Aminoil*<sup>294</sup> that related to the nationalization of an oil concession, it was decided that there was no general rule as to the length of oral hearings. A party exercising its right to be heard orally may decide to call say ten witnesses. The calling of these witnesses may immediately place a cost burden on the other party who may not have prepared financially for covering the cost of such a volume of witnesses. The arbitral tribunal may exercise its discretion and decide that evidence be covered by less witnesses, where it is evident from their statements that some of their testimonies are a duplication of the other testimonies. The arbitral tribunal as coordinator of the proceedings may need to hold a preliminary meeting with the parties to determine the best course of action.

Where an arbitral tribunal is permitted to exercise discretion as discussed above, a tribunal may choose to do the following acts:

- Limit the number of witnesses, or
- Limit the time within which a witness may testify, or
- Refuse to admit any oral evidence.

**II.1(c)(i) The Power of an Arbitral Tribunal to Limit the Number of Witnesses**

An arbitral tribunal may exercise its discretion where permitted by choosing to strategically reduce the number of witnesses that each party may call. In doing so, however, the number of expert witnesses that are called by an arbitral tribunal to testify on specific technical issues, or the experts that are called to testify on points in issue may not be reduced unless one report duplicates another.<sup>295</sup> This is because these are witnesses that assist the case with professional opinions and not witnesses whose testimonies relate to the facts of the case. As such each party must ensure that the witnesses they call address different aspects of the case. The limiting of the numbers is

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<sup>293</sup> Footnote No. 240  
<sup>294</sup> *ibid*  
<sup>295</sup> Article 27(2) of the UNCITRAL Rules

important as wealthy parties may decide to call a large number of witnesses to prove the same issue at the expense of the other party. This may be unfair on the other party who may be forced to pay for witnesses whose evidence is a repetition of the evidence of other witnesses.

The English Act permits an arbitral tribunal to appoint experts at its own cost in the absence of an agreement of the parties.<sup>296</sup> The experts that are called by the arbitral tribunal to make reports on specific issues cannot hold private meetings with the arbitral tribunal in the absence of the parties as such an action would be considered as being unfair to the parties. There are however a few exceptions where the tribunal may hold a meeting with the expert in the absence of the parties. In the case of *Luzon Hydro Corporation v. Transfield Philippines Inc.*<sup>297</sup> the court refused to set aside an award made in Singapore in which an expert on the Philippine law met the arbitral tribunal in the absence of the parties. The court accepted that the expert had only assisted the arbitral tribunal in sorting out evidence and in explaining technical terms in their private meeting. The court took cognizance of the fact that the parties had already previously agreed that the arbitral tribunal would carry out these tasks.

## II.1(c)(ii) The Power of an Arbitral Tribunal to Limit the Time within which a Witness May Testify

The power of an arbitral tribunal to conduct the arbitration proceedings in a manner it considers most appropriate<sup>298</sup> in essence gives it the discretion to limit the time within which a witness may testify if such action is helpful to the case.<sup>299</sup> A decision by an arbitral tribunal to limit the time within which each witness is to testify has to be communicated to the parties at the earliest opportunity so that the parties are given sufficient time to prepare their case. The parties must also at the earliest possible time

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<sup>296</sup> Section 37 of the English Act  
<sup>297</sup> (September 13, 2004) SGHC 204 (2004)

<sup>298</sup> Article 19(1) of the Model Law

<sup>299</sup> Binder (2005: 117)

give the arbitral tribunal copies of the witness statements to enable it be aware of the kind of testimony that each witness has.<sup>300</sup> In this way time may be apportioned appropriately.

In the *Margulead*<sup>301</sup> case, a sole arbitrator directed Counsel for both parties to make an hour's oral submission each. Counsel for Margulead was not permitted by the arbitrator to reply orally as the arbitrator decided that the reply was irrelevant. Mr Justice Colman in his judgment observed that the arbitrator had complied with his general duty as provided by the English Act when he directed each Counsel to take an hour to make oral closing submissions.

## II.1(c)(iii) The Power of an Arbitral Tribunal to Refuse to Admit Oral Evidence

The third strategy that an arbitral tribunal may adopt when permitted to exercise its discretion in deciding whether to hold oral hearings or not, is to refuse to admit it. In the case of *Dalmia Diary Industries v. National Bank of Pakistan*<sup>302</sup> a sole arbitrator refused to hear oral evidence from witnesses on the basis that the documentary evidence submitted which was in excess of one thousand pages, was sufficient to enable him arrive at a decision. The court decided that the decision by the arbitrator was fair. An arbitral tribunal may not entertain oral hearings if there is a probable risk of wasting time or if the oral evidence may only end up confusing issues. A case in point is the *Iron Ore Company of Canada v. Argonaut Shipping, Inc.*<sup>303</sup> case. In the case of *Demco v. SE Banken Forsakring*<sup>304</sup> the arbitral tribunal in dealing with 222 claims relied on the evidence that it received from two investors. It was on this evidence that the tribunal based its findings of fact.

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<sup>300</sup> Article 20(1) of the LCIA Rules

<sup>301</sup> Footnote No. 222, page 325 & page 329: "...There was nothing wrong with that form of procedure, provided that it gave each party a reasonable opportunity of putting his case and dealing with that of his opponent... the procedure that was adopted ...and what the arbitrator did was well within the scope of what he was empowered to do; he regulated procedural matters in a way which accorded to Margulead a reasonable opportunity of putting its case in the context of what was essentially a fair arbitral hearing."

<sup>302</sup> [1978] 2 Lloyd's Rep. 223 at page 269

<sup>303</sup> [S.D.N.Y. 1985], ICCA Yearbook XII [1987] page 173, at page 176: "...The panel also thought a subpoena might unduly delay the proceedings...the arbitrators found unacceptable the notion of prolonging the proceedings for an uncertain period in order to attempt to obtain a perhaps unobtainable, unilluminating report."

<sup>304</sup> [2005] 2 Lloyd's Law Reports 650

From the discussion in this part of the study it is evident that the collection of evidence by the arbitral tribunal must be done in a way that is permitted by the parties. This is because this is a procedural issue that falls within the control of the parties. A tribunal is only permitted to exercise this power in specific circumstances. The bottom line however, is that an arbitral tribunal requires evidence to enable it to arrive at its conclusion. At the end of the day however, the method that an arbitral tribunal chooses to use in collecting evidence must be one that will enable it to arrive at a correct and fair finding of fact.<sup>305</sup>

### III THE EXTENT OF AN ARBITRAL TRIBUNAL'S POWER TO EXTEND TIME LIMITS DURING THE ARBITRATION PROCESS

An arbitral tribunal that wishes to complete the arbitration proceedings within reasonable time needs to adopt time management techniques. Where time frames are embedded in the rules<sup>306</sup>, an arbitral tribunal is obliged to work within those set limits. The fixing of time frame enables an arbitral tribunal to be able to meet its target of making an award in time. In cases where the parties choose an appointing authority, it may provide the length of time within which an arbitral tribunal is to complete its work. Where the parties select an arbitral institution as their appointing authority the time scales provided by the institution's rules apply to the arbitration proceedings.

It is not in every situation that an arbitral tribunal manages to complete its work within the prescribed time. Where an arbitral tribunal does not manage to meet the prescribed time limits, an extension of such time may be required if the work is to be completed.<sup>307</sup> Therefore although rules of arbitration may provide set time limits within which an arbitral tribunal is to deal with each segment of the arbitration process, extra time may be required when ironing out a daunting issue. The court monitors the pace of the proceedings and may prompt an arbitral tribunal to give reasons for delay if the time is

<sup>305</sup> The Balears [1993] 1 Lloyd's Rep. 215 at page 228: "The principle of party autonomy decrees that a court ought never to question the arbitrator's findings of fact."

<sup>306</sup> Article 24 of the ICC Rules

<sup>307</sup> Redfern (2004: 49)



running out. If the court is aware of the reasons for the delay, it may extend a time limit without an arbitral tribunal requesting for such extension<sup>308</sup> if doing so will enable the tribunal to complete its work.<sup>309</sup> The way in which an application for an extension of time may be made is subject to the rules of arbitration governing the arbitration proceedings. Any situation that arises that causes destruction of the set course of the proceedings may result in an application for the extension of time, which application must be made in time.

There are situations when the application for the extension of time is made to apply retrospectively as was the case in the *Gold Coast Ltd v. Naval Gijon SA*<sup>310</sup> case. In that case the buyer made an application to court for a retrospective extension of time to enable it to apply to the arbitrator to correct the sixth interim award. This application had to be made in court as the time of 28 days within which the buyer could make the application before the arbitrator had expired. The court in granting the application took into consideration the following issues:

- Whether its intervention would cause unnecessary delay to the arbitration proceedings;
- Whether the failure to comply with the set time limits was excusable and;
- Whether a substantial injustice would be caused to the buyer if it did not have the extension availed to it.

An arbitral tribunal therefore must work within the time limits that are set for it by the parties. Extensions of time limits do occur if authorized by the parties. The fact that there is a time limit to be met enables an arbitral tribunal to structure its work effectively in order to be able to work within the set time frames. The structuring of the work may include as will be seen in the discussion hereunder the use of an arbitral tribunal's discretion to disallow applications that are made out of the set time limits. The use of this discretionary power by an arbitral tribunal enables it to abide by its fundamental obligations of fairness and the treatment of the parties equally.

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<sup>308</sup> Article 24(2) of the ICC Rules

<sup>309</sup> *ibid*, Article 32(2)

<sup>310</sup> [2007] 1 All ER 237

### III.1 The Admission of Additional Claims, Defence and Counterclaims

The Model Law gives an arbitral tribunal the discretion to allow a party to amend or supplement the statement of claim or defence during the course of the arbitration proceedings.<sup>311</sup> In exercising its discretion, an arbitral tribunal takes two aspects into consideration:

- The first aspect is whether the subsequent claims or defences are within the scope of the arbitration agreement and thus the tribunal's jurisdiction.
- The second aspect is the time at which the application is being made in the proceedings.

In relation to the first aspect, the arbitral tribunal may entertain the application if the new issues arising relate to the subject matter of the dispute that the tribunal has been mandated to deal with. There may be times when the same parties enter into a number of contracts that are interlinked. As a result of the dispute in one contract, a respondent may add in its counterclaim issues relating to another contract not covered by the arbitration agreement. If such circumstances arise, an arbitral tribunal may be inclined to refuse to admit the new application.<sup>312</sup>

Alan Redfern has stated that *"if the set-off claim is in relation to the same contract, or a contract with a sufficiently close connection to the main contract, then the arbitral tribunal may well have jurisdiction to consider the claim."*<sup>313</sup> An arbitral tribunal may exercise its discretion and allow a new claim with issues arising after the arbitration proceedings are in progress so long as the issues relate to the same subject matter. In the case of *National Oil Corporation (NOC) v. Libyan Sun Oil Co. (Sun Oil)*<sup>314</sup> the tribunal decided that although the circumstances relating to the new claim arose after the request for arbitration had been submitted, its terms of reference were broadly drawn and it was therefore able to admit the new claim. The course of action of an arbitral tribunal faced

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<sup>311</sup> Footnote No. 247

<sup>312</sup> Footnote No. 100

<sup>313</sup> Redfern (2004: 293)

<sup>314</sup> Final Award of 23 February 1987, 29 ILM (1990)

with a new application emanating from closely related contracts depends on how it interprets its powers in the arbitration agreement.

An arbitral tribunal may also be faced with an additional claim relating to one contract. For example an arbitral tribunal may be appointed to deal with a construction dispute that results from the undue delay in completing works by one party. Whilst the arbitration proceedings are going on, a wiring problem crops up at the construction site. An arbitral tribunal cannot choose to admit additional claim relating to the wiring problem without the agreement of the parties as the other party may want the wiring problem to be handled by another tribunal.

The second aspect relates to the time in the arbitration proceedings when a new application is made. The idea is to ensure that the admission of a new application does not delay the arbitration proceedings unnecessarily. The Model Law and some arbitration rules provide what may be considered as reasonable time of every stage of the arbitration process. For example, the Model Law gives the arbitral tribunal the power to use its discretion to disallow the application if it is made late.<sup>315</sup> The ICC Rules also permit an arbitral tribunal to disallow an application for an additional claim if it is made late or towards the close of the proceedings.<sup>316</sup> This is because the application may be considered unfair.

The ICC Rules give discretionary powers to an arbitral tribunal to consider the nature of new claims or counterclaims. If the arbitral tribunal believes that the issues raised are relevant to the dispute, it may allow the evidence supporting the claim or counterclaim to be admitted.<sup>317</sup> In essence, the arbitral tribunal is given powers to extend its jurisdiction without consulting its appointing authority. The parties to an arbitration agreement may by agreement extend the authority of the arbitral tribunal in part, depending on the needs at the time. Say for example there is a mining contract that is supposed to run for a period of twenty five years. The contract provides for an arbitral tribunal to deal with all

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<sup>315</sup> Article 23(2) of the Model Law

<sup>316</sup> Footnote No. 19

<sup>317</sup> *ibid*

the disputes arising between the parties through out that period. However, ten years on, one of the parties retires, and a new party takes over. In such a case, the arbitral tribunal may not in principle be deemed to still have jurisdiction to deal with all the disputes as the new party may in agreement in the other parties reformulate the terms of the contract. The new party and the other existing party may wish to redefine the extent of the arbitral tribunal's jurisdiction. If the arbitration agreement in this contract was governed by the ICC Rules, then it will be up to the Court to appoint another tribunal if need be.<sup>318</sup>

In redefining the extent of the arbitral tribunal's jurisdiction the parties may either decide to appoint another tribunal or extend the jurisdiction of the existing tribunal. The parties to an arbitration agreement are therefore able to make immediate changes to the jurisdiction of the arbitral tribunal in order to accommodate new issues which may not have been envisaged when giving the arbitral tribunal its original mandate; but which relate to the dispute at hand. The arbitral tribunal has got no power to extend its own jurisdiction, as that is the prerogative of the parties. The ICC Rules,<sup>319</sup> unlike other rules provide an arbitral tribunal with a duty to declare the proceedings closed. Article 22(1) of the ICC Rules however leaves a loophole for an arbitral tribunal to still admit new claims after it has declared the proceedings closed, thus neutralizing the intended need to declare the proceedings closed.

### III.2 The Non-Attendance of a Party

It is the responsibility of the arbitral tribunal to ensure that all parties are adequately informed of the hearing dates of the arbitration proceedings.<sup>320</sup> The failure by a party to attend the arbitration proceedings is an issue that may be unforeseen at the beginning of the arbitration proceedings. As such, parties to the arbitration agreement may not provide a time scale for non-attendance of a party. Once a party is absent his absence will consume time that is allocated for other issues to be dealt with. An arbitral tribunal will

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<sup>318</sup> Article 9 of the ICC Rules

<sup>319</sup> *ibid*, Article 22: "(1) When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed...."

<sup>320</sup> Section 103(2)(c) of the English Act

want to find out why the party is absent. The tribunal may only be in a position to know what to do after receiving reasons from the party for his non-attendance.

The reasons advanced by the party must be compelling enough to justify his absence. If the reasons are not compelling the other party may object to any application for an adjournment and insist that the proceedings continue. The power to continue or not however lies with the arbitral tribunal. An example of a compelling reason is the illness of a party. In the case of *Kanoria and others v. Guinness*<sup>321</sup> the court set aside an order for the enforcement of the award against the second defendant who was unable to present his case as he was convalescing after having undergone surgery. This information was communicated to the arbitral tribunal, but the arbitration proceedings continued in his absence.

An arbitral tribunal must be certain that the party not in attendance has failed to provide a valid reason for his absence before it can proceed with the arbitration proceedings. Scotland permits a tribunal to proceed *ex parte* only if the respondent defaults in filing his defence.<sup>322</sup> England also permits an arbitral tribunal to proceed with the arbitration proceedings *ex parte* if a party, without any reasonable cause fails to appear.<sup>323</sup> If however it is the claimant that fails to file his statement of claim,<sup>324</sup> then the tribunal has got power to discontinue the proceedings. This is a fair way of handling the proceedings because the tribunal will only proceed *ex parte* when a party sits on his rights. When an arbitral tribunal decides to continue with the arbitration proceedings in the absence of a party, the decision rendered under such circumstances will be made in default. In the case of *Libyan American Oil Company v. Libya (LIAMCO)*<sup>325</sup> Libya decided not to participate in the arbitration proceedings and as a result of that decision, the arbitral tribunal made a decision basing its finding of fact on the evidence before it.

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<sup>321</sup> Footnote No. 191

<sup>322</sup> Footnote No. 7, Article 25(b)

<sup>323</sup> Section 41 of the English Act

<sup>324</sup> op cit, Article 25(a)

<sup>325</sup> [1977] 62 ILR 140, 141



The Model Law gives an arbitral tribunal instances when it may continue with the proceedings in the absence of a party.<sup>326</sup> The ICC Rules<sup>327</sup> give power to an arbitral tribunal to proceed with the hearing if any party fails to appear without any reasonable cause after having been served with notice. The rules also permit an arbitral tribunal to continue with the arbitration proceedings in the absence of a party who refuses to file his defence or to take part in the proceedings.<sup>328</sup> Once the parties to an arbitration agreement allot time to an arbitral tribunal, the tribunal is in charge of ensuring that such time frames are respected.<sup>329</sup> Consequently, an arbitral tribunal is able to exercise discretion subject to it treating the parties fairly, as to the types of applications for adjournment that it wishes to allow.

### III.3 The Non-Attendance of an Arbitrator

The appointment of an arbitral tribunal is the prerogative of the parties<sup>330</sup> to an arbitration agreement which power may be transferred to a court in certain circumstances.<sup>331</sup> Some Rules of Arbitration permit arbitrators to appoint their chairman.<sup>332</sup> In the *Karaha Bodas*<sup>333</sup> case, Karaha Bodas named its own arbitrator, but the other parties failed to do so. Karaha Bodas therefore invoked the default provision of nominating arbitrators and the Secretary General of ISCID appointed the remaining arbitrators, one of whom was made Chairman of the arbitral tribunal.

If the appointment of an arbitral tribunal is done smoothly according to the parties' chosen method then there really is no issue. Problems arise when parties fail to perform. In the event of a party failing to make an appointment of an arbitrator then the other party has to turn to the agreed arbitration rules to see which course of action may be available to it. Some *ad hoc* arbitration agreements may provide for the already appointed

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<sup>326</sup> Article 25 of the Model Law

<sup>327</sup> Article 21(2) of the ICC Rules

<sup>328</sup> *ibid*, Article 6(3)

<sup>329</sup> Footnote No. 289

<sup>330</sup> Article 10(1) of the Model Law

<sup>331</sup> *ibid*, Article 11(3)

<sup>332</sup> Footnote No. 52

<sup>333</sup> Footnote No. 227

arbitrator to proceed with the arbitration as a sole arbitrator. This was the case in the arbitration between *Texaco Overseas Petroleum Co. (TOPCO) & California Asiatic Oil Co. v. Government of the Libyan Arab Republic*<sup>334</sup> where the Libyan Government refused to participate in the arbitration.

The power of an arbitral tribunal to continue with the proceedings in the absence of a member of the arbitral tribunal is discretionary, depending on the reasons that may be advanced for the absence. An arbitrator that chooses to stay away from the arbitration proceedings as a ploy to hold up proceedings after having been given sufficient notice may force the other members of the arbitral tribunal to proceed in his absence. The WIPO Rules permit an arbitral tribunal whose member is absent to use its discretion and continue with the proceedings if there is evidence that the arbitrator received notification and decided not to attend without excusing himself to the other members of the tribunal.<sup>335</sup>

An arbitrator may choose to stay away from the proceedings if he is under pressure from his appointing party to make a decision in the party's favour.<sup>336</sup> An arbitrator may also choose to stay away from the arbitration proceedings if he disagrees with the other members of the tribunal. In deciding whether to proceed or not, the present members of the arbitral tribunal may be inclined to make a decision whilst taking into consideration the stage of the proceedings. In the case of an arbitration governed by the ICC Rules, this decision lies with the Court.<sup>337</sup>

There are other reasons that are not deliberate, which may cause an arbitrator to be absent from the arbitration proceedings. Examples of these are the death or resignation of an arbitrator. Each set of arbitration rules provides its own acceptable reasons for the absence of an arbitrator and the course of action that the remaining members of the

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<sup>334</sup> Award of 19 January 1977, 17 I.L.M 3 (1978)

<sup>335</sup> Article 35 of the WIPO Rules

<sup>336</sup> Footnote No. 239, page 189 and at page 111: "In their final award the arbitral tribunal stated that if the arbitrator did not participate without a valid excuse, the appropriate solution was to continue in his absence, rather than to remove him. Accordingly, as Professor Priyatna's non-participation was found to be without valid excuse, the arbitral tribunal retained the authority to render an award."

<sup>337</sup> Article 12(5) of the ICC Rules

arbitral tribunal may adopt. It may be unnecessary to replace an arbitrator if the arbitration proceedings have advanced and are coming to a close. The remaining members of the arbitral tribunal may exercise their discretion and complete the proceedings in the absence of the said arbitrator. The time that an arbitral tribunal will require to settle this issue may change from case to case depending on the circumstances of each application. The mere absence however of an arbitrator is bound to derail the proceedings with the consequence of the tribunal being unable to meet the originally set time limits.

## CONCLUSION

This chapter shows how an arbitral tribunal has the ultimate power to resolve the parties' disputes using the procedure that the parties choose. The arbitral tribunal has got the sole responsibility of dealing with the issues in dispute between the parties and ensuring that the parties receive the appropriate remedies. The tribunal is mandated to exercise this power within the scope of its jurisdiction and in an impartial and independent manner. The tribunal may when appropriate, table issues arising in the dispute before the parties so that they may be able to express their position on the issues before the tribunal makes a decision. The tribunal's findings of fact must be supported by the agreement of the parties or by evidence as a basis upon which the award is based. In resolving the issues in dispute, the arbitral tribunal has a duty of ensuring that the parties' chosen order for directions and procedural law is strictly adhered to unless the parties agree otherwise.

Throughout the arbitration proceedings, the parties have got control and the prerogative to determine the course of the arbitration proceedings and may only permit an arbitral tribunal to do so when they are unable to decide or to reach a consensus. The parties are not obliged to transfer the power to determine the arbitration procedure to an arbitral tribunal whenever they fail to agree as some rules may require this power to be exercised by the arbitration institution. The study therefore looked at the extent to which an arbitral tribunal may exercise procedural powers when permitted to do so by the parties.

The study showed that the tribunal is permitted to exercise this power in default of the agreement of the parties and in a limited manner. The course that the tribunal chooses for the arbitration proceedings to take may only be implemented if the parties agree. The decision of the parties is influenced by the rules of arbitration and the procedural law. The UNCITRAL and the ICC Rules both permit an arbitral tribunal to participate in setting the course of the arbitration proceedings in varying degrees. Whereas the UNCITRAL Rules provides a set procedure that the arbitral tribunal may adopt when permitted to direct the course of the proceedings, the ICC Rules enables a tribunal to exercise discretion. The different procedures that each set of arbitration rules provides promotes a liberal attribute to the process of arbitration.

The parties permit an arbitral tribunal to exercise the procedural power of holding preliminary meetings in order to set the course or direction of the arbitration, strategize and identify common grounds between the parties. As a procedural power, the decisions of the tribunal must receive the parties' support. The determination of time limits in the arbitration proceedings is one of the procedural issues that an arbitral tribunal may exercise. This is usually in situations where circumstances arise that cause the already agreed time frames to change. An arbitral tribunal may be permitted to use its discretion and alter the set time limits depending on the reasons that a party may raise for the change. In such cases, an arbitral tribunal may apply time management techniques to ensure that the deadlines set by the parties for the arbitration are met. The submission of additional claims, the non-attendance of a party, an arbitrator or witness, are matters that may change the set time limits. The tribunal's exercise of discretion when faced with such applications is subject to the scope of the arbitration agreement and the stage of the arbitration proceedings when the application is made. The reasons for the non-attendance of a party must be genuine reasons and compelling to justify the granting of the application.

The determination of the seat of the arbitration is also a procedural matter that is decided by the parties with the tribunal taking over this responsibility in exceptional cases when parties fail to agree. The study saw that it was only feasible that the arbitration

proceedings have one home, whose laws would regulate the arbitration proceedings, with different venues where the arbitral tribunal would conduct their proceedings. The convenience and agreement of the parties were identified as influencing factors to a tribunal's choice of seat and venue of the arbitration proceedings. A request for a change of venue must be justifiable and fair if the tribunal is to grant it.

An arbitral tribunal collects evidence using the methods that the parties agree to. The tribunal's discretion in this area may only be exercised with the agreement of the parties. This study identified the oral hearings and documents only as methods that are available to an arbitral tribunal to collect evidence as well as a mixture of both. The parties may permit an arbitral tribunal to determine the language that is to be used in the arbitration proceedings. When this happens, the tribunal may take the language used in the parties' contract into consideration when determining the language to be used in the arbitration proceedings. The exercise of the power to determine the language of the arbitration is fundamental in ensuring that each party has an opportunity of being heard. The choice of a language that is understood by most parties and arbitrators speeds up the arbitration process. Where this is not the case however, translations of scripts and oral evidence must be submitted. The level of confidentiality that the parties may wish an arbitral tribunal to uphold during the conduct of the arbitration proceedings must be clear and precise. The parties must say whether they wish the tribunal to maintain confidentiality throughout the arbitration process or maintain it in a selective manner.



## CHAPTER THREE

### THE POWER OF AN ARBITRAL TRIBUNAL TO MAKE AN ARBITRAL AWARD

#### INTRODUCTION

The essence of this chapter is to discuss the power of an arbitral tribunal to make an award. The Model Law holds the position that the making of a final award by the arbitral tribunal signifies the termination of the arbitration proceedings.<sup>338</sup> The discussion will cover the essential elements of an award and the different types of awards that an arbitral tribunal is able to make. The discussion in this chapter will show that the making of the award is the ultimate task that an arbitral tribunal performs during its tenure in office. This stage of an arbitral tribunal's work is fundamental in that the award that is made must be one that is capable of being enforced at law<sup>339</sup> by a party in the enforcing state.

The study shows the need for an arbitral tribunal to ensure that it conforms to the *lex arbitri* in the making of an award.<sup>340</sup> This is an essential prerequisite if its award is to be recognized as valid and be capable of enforcement. An arbitral award is enforceable under the New York Convention<sup>341</sup> in countries other than the country in which it is made.<sup>342</sup> As its name suggests, the Convention ensures the recognition and enforcement of foreign awards. The foreign awards include "*not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.*"<sup>343</sup> The enforcement of an award is dependent on whether the party against whom enforcement is sought has got jurisdiction in the country of enforcement.

In order for jurisdiction to be established, the party applying for enforcement of the award must be certain that the other party has assets in the country where the application

<sup>338</sup> Article 32(1) of the Model Law

<sup>339</sup> Article 35 of the Model Law

<sup>340</sup> Article 32(7) of the UNCITRAL Rules: "If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply..."

<sup>341</sup> Article III of the New York Convention

<sup>342</sup> *ibid*, Article 1

<sup>343</sup> *ibid*, Article 1.2

for enforcement is to be made. The ability to enforce an award in a country other than where it is made makes international commercial arbitration an attractive method of resolving disputes by business entities that engage in trade across borders. An award should address a specific issue relating to the dispute between the parties and should include a specific decision of the arbitral tribunal. The rights and obligations of the parties in the dispute must be established with an award of appropriate remedies. An arbitral tribunal may only award a remedy to a deserving party if it is within its power to make such an award.

This chapter is divided into two sections. The first section discusses the making of an arbitral award and the essential elements of an award. The second section deals with some of the different types of arbitral awards that an arbitral tribunal may award including the final award. It further deals with the time limits within which an arbitral tribunal may make its final award.

## I. The Making of an Arbitral Award

An arbitral award is fundamental to the arbitration proceedings as it marks the resolution of the differences between the parties to an arbitration agreement that may have led to the initiation of the proceedings. The Model Law,<sup>344</sup> the English Act<sup>345</sup> and the New York Convention<sup>346</sup> all deal with an arbitral award that is made by an arbitral tribunal. This is the position held by the ICC<sup>347</sup> and the UNCITRAL Rules.<sup>348</sup> The discussion in this section looks at an arbitral tribunal's making of a final award that in essence terminates its mandate.

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<sup>344</sup> Article 31(1) of the Model Law

<sup>345</sup> Section 47(1) of the English Act: "Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined."

<sup>346</sup> Footnote No. 343

<sup>347</sup> Article 25(1) of the ICC Rules: "When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal."

<sup>348</sup> Article 31(1) of the UNCITRAL Rules

The issuance of an award that is capable of being enforced is an arbitral tribunal's main objective. A final award signifies the determination of the parties' rights and obligations in their relationship as well as the complete resolution of all the issues that may have led to the dispute between the parties.<sup>349</sup> An arbitral tribunal has got the responsibility of ensuring that issues that are raised by the parties in evidence are addressed adequately in order for it to be able to draw the correct findings of fact. It is from these findings of fact that inferences are drawn that help the tribunal to draw its final award.

The case of *AEGIS Ltd v. European, Re*<sup>350</sup> showed that an agreement by the parties to arbitrate implies that they are agreeable to the performance of the award. Each party is therefore bound by the directives of the arbitral tribunal in the award, which directives have to be obeyed. Where these directives are not obeyed, a party in whose favour the arbitral award is made, subject to the New York Convention, may request a court to have the arbitral award recognized and enforced in the country where the losing party has assets.<sup>351</sup>

During the drafting of the Model Law, UNCITRAL considered the following definition of the term award which definition was not adopted in the instrument. The definition was as follows:

*"An award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award."*<sup>352</sup>

Although the definition was never adopted, it is being used in this chapter to provide guidance of the essential elements of an arbitral award.<sup>353</sup> A decision of an arbitral tribunal that answers the questions raised by the parties and provides specific remedies to the parties qualifies to be a final award. If the remedy is in the form of damages, it

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<sup>349</sup> *ABC International v. Diverseylever* [2003] XXVIII Ybk Comm Arbn 209-16

<sup>350</sup> [2003] 1 WLR 1041

<sup>351</sup> Footnote No. 341

<sup>352</sup> Holtzmann (1989: 154)

<sup>353</sup> Redfern (2004: 354): "Award means a final award which disposes of all issues submitted to the arbitral tribunal..."

should be such that it is able to restore the injured party to the position he was in before his rights were infringed. In the *A-G v. Blake*<sup>354</sup> case, Lord Nicholls stated among other things that:

*“The general rule is that....the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong...”*<sup>355</sup>

An arbitral tribunal is appointed to work under an autonomous process. Its final award is binding on the parties to the arbitration agreement and may in some cases not be subjected to an appeal. For instance, whilst the Model Law does not provide for appeal as a means for recourse against an award,<sup>356</sup> the English Arbitration Act does.<sup>357</sup> In the case of *Fidelitas Shipping Co Ltd v. V/O Exportchleb*<sup>358</sup> Diplock LJ stated that:

*“The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal.”*

Apart from making an award an arbitral tribunal also has power to make a decision in the form of an order. The issues arising at each stage of the arbitration proceedings and the governing procedural law determine whether an arbitral tribunal will make an award or order. Although an arbitral award is mainly concerned with the resolution of substantive issues in the dispute, the resolution of all other interlocutory matters arising in the arbitration result in an arbitral tribunal issuing orders or interim awards.<sup>359</sup> Under the Model Law a court may recognize and enforce an interim measure made by a tribunal when requested to do by a party or a tribunal.<sup>360</sup> This may occur in circumstances where a party fails to execute an order willingly. The coercive powers of the court may therefore be used under such circumstances.

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<sup>354</sup> [2001] AC 268 at page 278-280

<sup>355</sup> *ibid*

<sup>356</sup> Article 34 of the Model Law

<sup>357</sup> Section 58 of the English Act

<sup>358</sup> [1965] 2 All ER 4 at page 10

<sup>359</sup> Article 32(1) of the UNCITRAL Rules: “In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.”

<sup>360</sup> A/CN.9/592, Article 17 Novies of Annex I

## 1.1 The Essential Elements of an Award

A valid award is made up of essential ingredients that alter depending on the parties' agreement.<sup>361</sup> The components of an award must be such that it is enforceable at law. The New York Convention has provided its own threshold of the minimum standards required of a valid award.<sup>362</sup> In the same vein each legal system and arbitration rules also provide their own threshold of what they consider to be the minimum standard that a valid award should attain. The standard taken by most legal systems and rules of arbitration are in conformity with those of the New York Convention. The discussion of the essential ingredients of a valid award will mirror the thresholds held by the Convention and what the arbitration rules provide. The usual ingredients are follows:

- An arbitral award must be in writing.
- An arbitral award must state its seat and be dated.
- An arbitral award must contain reasons.
- An arbitral award must award remedies.
- An arbitral award may award costs.
- An arbitral award may award interest.
- An arbitral award must be in the agreed currency
- An arbitral award must be signed.

The detailed discussion below relating to these ingredients will show that in order for an award to qualify as a final award, it must in addition to these ingredients be capable of portraying a binding and final nature.

### 1.1(i) A Written Award

The usual practice in international commercial arbitration is for an award to be made in writing.<sup>363</sup> The Model Law sets a standard format upon which an award should conform to as follows:

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<sup>361</sup> Turner (2005: 33 & 36): "There is no mandatory style of an award. There is, however, a well recognised general approach – at least a basis of sequence and nature of content, from which individual styles or particular awards can evolve..."

<sup>362</sup> Article V of the New York Convention

<sup>363</sup> A/CN.9/592, Article 7(2)



*“(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reasons for any omitted signature is stated.*

*(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.*

*(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at the place.*

*(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.”<sup>364</sup>*

The UNCITRAL Rules also requires an arbitral award to have the following form and effect:

*“(2) The award shall be made in writing and shall be final and binding on the parties....*

*(3) The award shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.*

*(4) An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made.....”<sup>365</sup>*

Unlike the UNCITRAL Rules referred to above, the ICC Rules do not expressly refer to the written provision of an award, although this is implied. The ICC Rules requires that an arbitral tribunal submit a draft of its award to the Court for scrutiny before signing it.<sup>366</sup> It is therefore evident that an arbitral award must be in document form. The arbitral tribunal has a duty of preparing hard copies of its arbitration award for submission to the Court,<sup>367</sup> in the case of an arbitration governed by the ICC Rules and, to the parties in the case of an arbitration governed by the UNCITRAL Rules.<sup>368</sup>

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<sup>364</sup> Article 31 of the Model Law

<sup>365</sup> Article 32(2), (3) & (4) of the UNCITRAL Rules

<sup>366</sup> Article 27 of the ICC Rules

<sup>367</sup> *ibid*: “Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court... No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”

<sup>368</sup> Article 32(6) of the UNCITRAL Rules: “Copies of the award signed by the arbitrators shall be communicated to the parties...”

### I.1(ii) An Award Stating the Seat of Arbitration and the Date of the Award

The stating of the seat of the arbitration and the date of the award are ingredients that are fundamental to the validity of the award. The stating of the seat of the arbitration and the date on which the arbitral award is made though discussed under one umbrella in this section, serve two distinct reasons. The specification of the seat of the arbitration identifies the law that an arbitral tribunal applied when conducting the arbitration proceedings. This is the law by which the validity of the arbitral award is gauged. In order to be valid therefore, the arbitration proceedings and the ensuing arbitral award must conform to the mandatory provisions of the law at the seat of the arbitration. The UNCITRAL Rules requires the arbitral tribunal to make the award at the seat of arbitration.<sup>369</sup> The English Act<sup>370</sup> states *inter alia* that an award must be made at the seat of arbitration. The date on which the arbitral award is made on the other hand marks the effective date of the award. This date may be used to calculate interest or the time frame within which to lodge a challenge. An award may only have effect on a party from the date of service.

The English Act provides the format expected of an arbitral award in the absence of an agreement by the parties.<sup>371</sup> The award must amongst other things state the seat of the arbitration and the date when the award is made. These elements must be expressly stated in an award. This is the case even in instances where none of the hearings take place at the seat of the arbitration.

Members of an arbitral tribunal may in most cases sign the award on different days as they are usually in different places at the time that the award is signed. Some arbitration rules provide that the date that is stated on the award is the date that is considered as the date of the award.<sup>372</sup> The English Act gives the parties the initial responsibility of deciding the date of the award. In the absence of an agreement “*the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than*

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<sup>369</sup> *ibid*, Article 16(4)

<sup>370</sup> Section 100(2)(b) of the English Act

<sup>371</sup> *ibid*, Section 52(3), (4) & (5)

<sup>372</sup> Article 25(3) of the ICC Rules

one arbitrator signs the award, by the last of them.”<sup>373</sup> In the absence of the agreement of the parties therefore, the date of the award is determined in relation to the dates when the arbitrators sign the award.

### 1.1(iii) An Award with Reasons

Whether reasons should be given for a decision made really depends on the *lex arbitri* and the governing rules of arbitration. A number of arbitration rules and some national systems of law require that reasons be given for an award.<sup>374</sup> It is however good for an arbitral tribunal to give reasons for its decisions where the rules are silent as to whether it should give reasons or not. The ICC Rules requires that the tribunal give reasons for its decision to the parties.<sup>375</sup> The English Act requires that an award should contain reasons unless agreed otherwise by the parties.<sup>376</sup> The parties to the arbitration agreement may request the arbitral tribunal to either attach the reasons to the award or issue them as a separate statement. Lord Saville stated in the DAC Report on Arbitration Law that:

*“To our minds, it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making the decision.”*<sup>377</sup>

The reasons that are given for the award should be based on issues that have been addressed in the arbitration proceedings. In the case of *ABB AG v. Hochtief Airport GmbH and another*,<sup>378</sup> the court decided that:

*“Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges...”*<sup>379</sup>

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<sup>373</sup> op cit, Section 54

<sup>374</sup> Footnote No. 187

<sup>375</sup> Article 25(2) of the ICC Rules

<sup>376</sup> Footnote 371, Section 52(4)

<sup>377</sup> Footnote No. 18, paragraph 247

<sup>378</sup> Footnote No. 279, page 564

<sup>379</sup> ibid

In instances where parties would like the reasons for the award to be private, the tribunal may issue the reasons separately from the award. Each country takes its own stand on whether private reasons can be referred to in court in circumstances where a party raises a challenge against an award.<sup>380</sup> It is in principle good and helpful for an arbitral tribunal to give reasons for its award on the merits. A number of countries such as Scotland that have adopted the Model Law require that the arbitral tribunal give reasons for its award unless the parties agree otherwise.<sup>381</sup> In circumstances where the parties to an arbitration agreement want an arbitral tribunal to give reasons for its award, then the tribunal is obliged to give adequate reasons for its decision, failing which its work would face criticism and challenge for being inadequate.<sup>382</sup>

The reasons help the parties understand and appreciate the award that is handed to them by the arbitral tribunal. The issues that are raised in the reasons for the award cannot only assist the parties to understand how and why the tribunal arrived at its decision, but they may also assist a losing party who decides to challenge a part of or the whole award. In instances where the parties reach an amicable settlement, the arbitral tribunal loses its opportunity to settle the dispute<sup>383</sup> and is therefore unable to give reasons. Where parties settle their disputes amicably, an arbitral tribunal may be tasked to draw the parties' settlement terms in the form of an award in order for it to be easily enforceable.<sup>384</sup> An arbitral tribunal may only permit the parties to an arbitration agreement to consider an amicable settlement if the *lex arbitri* permits such a procedure.

Most countries that have adopted the Model Law recognize the amicable settlement of disputes. Scotland is one such country that permits the amicable settlement of a dispute by agreed terms.<sup>385</sup> The parties may authorize the arbitral tribunal to record their

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<sup>380</sup> *Tame Shipping v. Easy Navigation Ltd* (2004) 2 All ER (Comm) 521 at page 527: "Sometimes the arbitrator will ask the parties before the conclusion of the hearing whether they wish him to issue separate reasons....."

<sup>381</sup> Footnote No. 7, Article 31(2)

<sup>382</sup> *Torch Offshore LLC v. Cable Shipping* (2004) 2 All ER (Comm) 365 at page 370

<sup>383</sup> Footnote No. 173

<sup>384</sup> Article 26 of the ICC Rules

<sup>385</sup> Note further footnote No. 7, Article 30

settlement on agreed terms in the form of an award that is capable of enforcement.<sup>386</sup> It is a generally held position that an amicable settlement of the disputes leads to the termination of the proceedings. In the case of countries that do not recognize the amicable settlement of disputes, the settlement of the disputes by the parties terminates both the arbitration proceedings and the powers of the arbitral tribunal. Where the method is permitted however, the settlement of a dispute by agreed terms only terminates the arbitration proceedings and not the powers of the arbitral tribunal as it may still be requested by the parties to record the settlement terms in the form of an award.<sup>387</sup>

#### I.1(iv) Remedies

Remedies are in essence an answer or resolution to a dispute between parties to an arbitration agreement. The terms of the arbitration agreement as well as the *lex arbitri* may impose a limit on the remedies that an arbitral tribunal may award. For instance the English Act enables parties to give power to an arbitral tribunal to decide on the remedies it may award.<sup>388</sup> The remedies may be in the form of an award or an order depending on the issues that the parties wish the arbitral tribunal to address. The arbitral tribunal has got power under the English Act to order any of the following remedies; a Declaratory Order; a Monetary Order in any currency; a Restraining Order; an Order for Specific Performance of the contract;<sup>389</sup> and the Rectification of a document.<sup>390</sup> The Act does not allow a party to invoke the court's jurisdiction without having exhausted any other available procedural options before the tribunal.<sup>391</sup>

Once an arbitral tribunal makes an Order, the English Act does not give it further power of forcing a respondent to obey its order. It is only a court at the seat of the arbitration

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<sup>386</sup> Supra No. 173

<sup>387</sup> *ibid*

<sup>388</sup> Section 48 of the English Act

<sup>389</sup> Tweeddale (2005: 345): "Most arbitration legislations permit the arbitral tribunal to make orders and declarations as between the parties. However, orders for specific performance may not always be appropriate in international commercial arbitration... Orders for specific performance or injunctions cannot be as easily transferred from one jurisdiction to another."

<sup>390</sup> *op cit*

<sup>391</sup> Section 42(3) of the English Act



that is able to exercise coercive powers against a party when requested to do so. Without this assistance from court,<sup>392</sup> the arbitral tribunal's pronouncements would be 'academic' as there would be no assurance of their enforcement. It can be seen that whilst the English Act in its Section 38 gives powers to an arbitral tribunal to make orders and declarations, it does not go further to give power to a tribunal to enforce their orders.<sup>393</sup>

Section 44 the English Act on the other hand, gives powers to a court to make court orders relating to the directions that may be made by the tribunal. The court orders contain a penal notice that is absent from an order made by an arbitral tribunal. The courts in this way do not usurp the arbitrators' powers, but only chip in when the arbitrators do not have the specific power that the court will be asked to exercise on their behalf by the parties.<sup>394</sup> The courts are thus a partner and vital arm required by the arbitral tribunal in its performance of its task of ensuring that the arbitration process is deliberated upon expeditiously and at minimal and reasonable cost.

It is important to note that irrespective of the type of award that an arbitral tribunal makes and whatever remedy it issues, it generally lacks coercive powers. One finds that almost any kind of award requires sanctions of one type or another. Courts in countries that support international commercial arbitration are available to be utilized to cure this deficiency of the arbitral tribunal. Whilst an arbitral tribunal's powers are usually limited to giving directions to parties, a court's powers are not so limited and therefore more extensive<sup>395</sup> in that the court can ensure specific performance of an arbitral tribunal's decision.

An arbitral tribunal may only award remedies that it is permitted to award at the seat of the arbitration. It must be noted that the type of remedies that are permitted in one country may not be permitted in another country. Remedies such as exemplary damages do not have a uniform acceptability. Ireland for instance does not permit an arbitral

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<sup>392</sup> *ibid*, Section 44

<sup>393</sup> Footnote No. 150

<sup>394</sup> *op cit*, Section 44(5)

<sup>395</sup> Redfern (1999: 249)

tribunal to award punitive damages. An arbitral tribunal must therefore be certain that the *lex arbitri* permits the awarding of a remedy before it makes the award, as enforcement of the award may not be assured if the remedy is not recognized at the seat of the arbitration. An arbitral tribunal's final award must therefore be clear and precise. Restitution<sup>396</sup> is one of the common remedies available to an arbitral tribunal. This remedy involves an arbitral tribunal putting a party back into the position he was in before the occurrence of the dispute. Other remedies such as freezing orders operate only *in personam* and do not give any security interest in property, as they do not operate *in rem*.<sup>397</sup>

### 1.1(v) Costs

The issue of how the costs in the arbitration are to be borne lies in the parties' domain. The parties have got the autonomy to agree in their arbitration agreement on every aspect of costs. A material change in the circumstances of the case such as the oral hearings taking twice the anticipated time may only attract more costs if the parties did not take a stand on further costs.<sup>398</sup> However, where the parties fail to agree, an arbitral tribunal is permitted under the English Act to make an arbitral award that deals specifically with the question of costs.<sup>399</sup>

In the case of *Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd – The Athena*<sup>400</sup> the court held that section 47 had given the arbitral tribunal the power to deal with the issue of costs in a separate award. In instances when an arbitral tribunal is permitted to deal exclusively with the question of costs, it will address the issue as it arises any time during the arbitration.<sup>401</sup> In cases where an arbitral tribunal makes a final award but has to later make typographical corrections or interpret

<sup>396</sup> Ministry of Defence and Ashman and Ministry of Defence v. Thompson (1993) 2 EGLR 107

<sup>397</sup> Kastner v. Jason (2005) 1 Lloyd's Law Reports 397 at page 399

<sup>398</sup> Republic of Kazakhstan v. Istil Group Inc. [2006] 2 All ER (Comm) 26: The appeal for further security for costs was allowed by the court.

<sup>399</sup> Section 61 of the English Act

<sup>400</sup> [2006] 2 All ER (Comm) 648 at page 649: "...there had been nothing unfair in the tribunal deciding to deal with costs at a further hearing and in a further award."

<sup>401</sup> Footnote No. 7, Article 24(5)

the award pursuant to Article 33 of the Model Law, an additional award on costs may be made to cover these extra costs. An arbitral tribunal may where permitted indicate in its award which party is to bear which costs.<sup>402</sup> Once an arbitral tribunal makes an order for costs, the party that is ordered to pay costs is obliged to do so within the prescribed time limits as any delay may either delay the arbitration proceedings or the parties' receipt of their award,<sup>403</sup> depending on the stage of the proceedings when the order is made.

Where the costs in issue are an advance on costs, and one party fails to make the payment, the other party may pay on his behalf in order for the arbitration proceedings to progress. In the case of *Coppee Lavalin v. Ken-Ren Chemicals and Fertilizers Limited*,<sup>404</sup> one party paid the advance costs of arbitration on behalf of the other party that did not pay. An arbitral tribunal has got the power to refuse to deliver an arbitral award to the parties if the stated portion of the costs that is supposed to be paid before the deliverance of the award is not met. The way in which an arbitral tribunal may handle the issue of costs depends on the governing procedural laws and rules of arbitration. In the case of *Indescon Ltd v. Ogden*,<sup>405</sup> the court decided amongst other things that it was for the arbitral tribunal to make an order for costs.

The Model Law is silent on what may constitute the costs of the arbitration. The English Act states that costs of the arbitration include the following:

“(a) the arbitrator’s fees and expenses,  
(b) the fees and expenses of any arbitral institution concerned, and  
(c) the legal or other costs of the parties.”<sup>406</sup>

Costs under the ICC Rules includes the fees and expenses of arbitrators and experts appointed by the arbitral tribunal; the administrative expenses of the institute; the legal costs, plus costs relating to any encumbrances that may be incurred by the parties relating

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<sup>402</sup> Section 62 of the English Act

<sup>403</sup> *ibid*, Section 56(1)

<sup>404</sup> [1995] 1 AC 38

<sup>405</sup> [2005] 1 Lloyd’s Law Report 31 at page 40

<sup>406</sup> Section 59(1) of the English Act

to the arbitration.<sup>407</sup> The administrative expenses of the ICC Institute may also include the costs of the Terms of Reference and the scrutiny of the arbitral award.<sup>408</sup> This administrative cost is a cost that is unique to an arbitration conducted under the auspices of the ICC Rules.

An arbitration that is governed by the ICC Rules has its costs fixed by the Court of Arbitration whilst the arbitral tribunal decides which party is to bear which costs and in which measure.<sup>409</sup> As such an arbitral tribunal has got very limited powers in relation to the issue of costs. This is not the case with the UNCITRAL Rules that gives an arbitral tribunal the power to conduct the arbitration in a manner it considers appropriate.<sup>410</sup> This may be assumed to include the determination of the costs. Costs under the UNCITRAL Rules include the arbitral tribunal's fees as well as the expenses that the tribunal incurs during the conduct of the arbitration proceedings and where appropriate, the legal costs of the successful party.<sup>411</sup> The legal costs in arbitration may sometimes follow the events. For instance, in the *Himpurna*<sup>412</sup> case, the arbitral tribunal decided that the costs of the arbitration were to be borne by Indonesia as the losing party.

In instances where an arbitral tribunal is permitted to fix the costs of the arbitration, it may exercise discretion and take into account the circumstances surrounding the proceedings when awarding costs. A tribunal may further exercise discretion and make interim awards but leave the question of costs to be dealt with at a later stage. An arbitral tribunal may also refuse to award costs<sup>413</sup> if the party entitled to costs was instrumental in causing the delay in the completion of the proceedings. The determination and fixing of costs is a continuing task that the arbitral tribunal undertakes throughout the proceedings, although in some cases such as under the ICC, the tribunal has got no power to fix the

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<sup>407</sup> Article 31 of the ICC Rules

<sup>408</sup> *ibid*, Articles 18 and 27

<sup>409</sup> *op cit*,

<sup>410</sup> Footnote No. 163

<sup>411</sup> Article 38 of the UNCITRAL Rules

<sup>412</sup> Footnote No. 239, at page 213

<sup>413</sup> Footnote No. 400, page 654: "There may be cases where it is not clear whether the tribunal has left open the question of costs for further consideration or has intentionally said nothing about them because it intends to make no order."

costs. In whichever case however, it is the arbitral tribunal's responsibility to state the costs of the arbitration and how they are to be borne.

### 1.1(vi) Interest

An award of interest is usually made in a monetary claim where circumstances of the case demand that interest be claimed. The most usual reason that attracts a claim of interest is a delay in payment. In the case of *Charterer (Liberia) v. Owner (Russian Federation)*,<sup>414</sup> the arbitral tribunal stated *inter alia* that:

*"It is a general principle of law, as well as of international trade practice, that the harm normally sustained as a consequence of delay in payment of a sum of money be compensated by interest."*<sup>415</sup>

In the case of *Westland Helicopters Ltd. v. Sheikh Salah Al-Hejailan*<sup>416</sup> one of the issues that had to be determined was whether the arbitrator had jurisdiction to make a separate award of interest. The court held that the arbitrator was correct to regard the claim of interest as an independent claim agreed to by the parties but limited to the period referred to in the initial claim.

The English Act gives power to an arbitral tribunal to award either simple or compound interest depending on the circumstances of each case.<sup>417</sup> In the case of *Agent (Spain) v. Principal (Denmark)*<sup>418</sup> it was decided that the rate of interest to be paid in the event of it not being provided in the contract, would be the rate of interest applicable to the currency in which the damages were calculated. In cases where an arbitration agreement authorizes an arbitral tribunal to make an award of interest, the arbitral tribunal has to determine a justifiable rate of interest pursuant to the provisions of the arbitration agreement.

<sup>414</sup> Final Award in Case No. 9466 of 1999 (2000) XXVII Ybk Comm Arbn 170-80

<sup>415</sup> *ibid*

<sup>416</sup> (2004) 2 Lloyd's Rep. 523

<sup>417</sup> Section 49(3) of the English Act: "The tribunal may award simple or compound interest from such dates, at such rates...as it considers meets the justice of the case..."

<sup>418</sup> Final Award in Case No. 8817 of 1997, (2000) XXV Ybk Comm Arbn 354-67



The arbitral tribunal also owes the parties a duty of care in ensuring that the correct type of interest and rate is applied to the award if applicable. An arbitral tribunal cannot apply compound interest where the arbitration agreement provides for simple interest. An arbitral tribunal cannot equally calculate interest at a different rate from that which the arbitration agreement provides. In an *ad hoc* arbitration that does not usually provide any rate of interest to be used, the arbitral tribunal may use the rate of interest of an appointing authority as a guide in its calculation. If a set of arbitration rules has been adopted, the arbitral tribunal will base its calculation of interest on what is provided by the adopted arbitration rules.

In an *ad hoc* arbitration which has not adopted any arbitration rules and which does not have an appointing authority, the arbitral tribunal may be guided in its calculation of interest by the provisions of the arbitration law at the seat of the arbitration in the absence of the parties' agreement. If the seat of the arbitration is in England or Singapore for example, the arbitral tribunal is at liberty to apply simple or compound interest as that is permissible by the English Act<sup>419</sup> and the Arbitration Act of Singapore<sup>420</sup> respectively. The EU Directive<sup>421</sup> on combating late payments in commercial transactions permits an 8% rate of interest above base rate in circumstances where the parties do not make any special arrangements on the question of interest.

From this discussion it is clear that the award of interest lies in the discretion of an arbitral tribunal. A tribunal may therefore award interest in its final award even if it is not specifically pleaded depending on the facts of each case. An arbitral tribunal may however not be able to make a separate award of interest unless it is specifically pleaded. Where an arbitral tribunal makes an award of interest, it will be calculated pursuant to what is permitted by the *lex arbitri* and the rules of arbitration.

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<sup>419</sup> Footnote No. 417

<sup>420</sup> Section 12(5)(b) of the International Arbitration Act of Singapore

<sup>421</sup> Directive 2000/35/EC

### I.1(vii) Currency

It is also the responsibility of an arbitral tribunal to ensure that the award is drawn in the currency that the parties have agreed upon. Some arbitration rules such as those of WIPO<sup>422</sup> are flexible in that an arbitral tribunal is given power to express any monetary amount in any currency. This is not the case with the AAA Rules that require a monetary award to be expressed in the currency of the contract. These rules as well as the CPR Rules give the arbitral tribunal the discretion to apply another currency other than that of the contract to a monetary award if it considers it to be more appropriate.<sup>423</sup> International commercial arbitration legislation such as that of England also gives arbitral tribunals such discretionary power.<sup>424</sup>

The power of an arbitral tribunal to express an award in any currency other than that of the contract was applied by the tribunal in the *Lesotho Highlands*<sup>425</sup> case. In that case, the contract provided for the applicable currency to be that of Lesotho. However the arbitral tribunal, by virtue of section 48(4) of the English Act exercised its discretion therein and instead calculated the monetary value of the award in a European currency. The arbitral tribunal's use of its discretionary power worked to the advantage of the claimant, as the European currency was stronger than the Lesotho currency that was the currency provided for in the contract.

This worked to the disadvantage of the respondents especially considering that the English law allowed the arbitral tribunal to calculate the monetary value of the award including interest using compound interest.<sup>426</sup> The Court held that the tribunal committed an error of law in its application of the European currency to the monetary amount of the award. The tribunal's action amounted to an erroneous exercise of its available powers. This case prevents the arbitrary use of available powers of the tribunal by looking around the globe for a currency that is strongest on the market and applying it as well as applying

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<sup>422</sup> Article 60(a) of the WIPO Rules

<sup>423</sup> Article 28(4) of the AAA Rules and Rule 10(6) of the CPR Rules

<sup>424</sup> Section 48 of the English Act

<sup>425</sup> Footnote No. 68

<sup>426</sup> Footnote No. 417

compound interest to the detriment of the respondent. An arbitral tribunal owes the parties a duty to exercise its available powers reasonably and fairly.

#### I.1(viii) A Signed Award

A final award must be sent to the parties immediately it is signed as it only becomes effective from the time that the parties receive it. The ICC Court requires that an arbitral tribunal send it the draft form of the award before it is signed for scrutiny and approval.<sup>427</sup> The approval only relates to the format of the final award and not its substance.<sup>428</sup> This is done in order for the award to meet the required threshold. An arbitral award is signed in accordance with the terms and conditions of the governing arbitration rules and the applicable procedural rules. Each country may therefore fix its own benchmarks of the type of signing that it requires.

The English Act considers an arbitral award that is signed by the arbitrators that consent to it, to be valid.<sup>429</sup> Consequently, even if the dissenting parties refuse to sign the award, it will still be valid. In Scotland, a valid arbitral award must be signed by a majority of the members of the arbitral tribunal. A statement of the reasons why the others have not signed must be provided. Scotland conforms to the Model Law position<sup>430</sup> that states *inter alia* that:

*“...the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”<sup>431</sup>*

The UNCITRAL and the ICC Rules<sup>432</sup> recognize an award signed by a majority of the members of the arbitral team. In instances where there is no majority, the award may be

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<sup>427</sup> Footnote No. 367

<sup>428</sup> Article 6 of Appendix II of the ICC Rules: “When the Court scrutinizes draft awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration.”

<sup>429</sup> Footnote No. 371

<sup>430</sup> Footnote No. 364

<sup>431</sup> Footnote No. 7, Article 31

<sup>432</sup> Article 25(1) of the ICC Rules

made by the chairman of the tribunal alone<sup>433</sup> in order to make progress in the arbitration. However, the Model Law<sup>434</sup> only permits a presiding arbitrator to decide on behalf of the others in interim applications and not when dealing with the final award. Where only a majority of the members of an arbitral tribunal are permitted to sign an arbitral award, the award is still a reflection of what the tribunal as a whole has decided. The fact that an arbitrator does not sign the arbitral award does not mean that he did not participate in the making of the award, as he will have worked together with the other members of the team up to that time.<sup>435</sup>

It is clear that the fact that a majority decision may sometimes suffice means that it is not in all circumstances that a tribunal is unanimous in its decision making process. If in a 'three man' tribunal, one member arrives at a different decision from the other two and therefore refuses to sign the arbitral award, the award reflecting the decision of the two members is a majority decision. If however, all the members hold different views, then arbitration rules such as the ICC<sup>436</sup> may allow the presiding arbitrator to make the award. The presiding arbitrator is therefore able to maintain an independent position from the rest of the tribunal.<sup>437</sup> This is assuring as irrespective of whether the arbitral tribunal agrees or not in its decision, the parties still receive an award.

Having said that, it is however more comforting for the parties to receive a majority decision in a three man or more arbitration as then they are assured that the decision is the right one. There may however be a need for an arbitrator to concur with a decision of the other arbitrators in order to form a majority. The court ruled in the case of *Guinea-Bissau v. Senegal*<sup>438</sup> that:

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<sup>433</sup> Caron (2006: 749): "...the presiding arbitrator may decide procedural matters on his own where a majority opinion cannot be formed...subject to revision by the tribunal. ... it is a generally accepted principle of international arbitration that the deliberations of the tribunal shall be kept secret, save for extreme circumstances where disclosure is compelled in the interest of justice."

<sup>434</sup> Footnote No. 56: "In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members..."

<sup>435</sup> Footnote No. 106, Article 32(1)

<sup>436</sup> Footnote No 346

<sup>437</sup> Derains (2005: 307)

<sup>438</sup> [1991] ICJ Reports 40

*“As the practice ... shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution...”<sup>439</sup>*

An arbitrator may refuse to sign an arbitral award for a number of reasons. For example the arbitrator may be under pressure from the party that appointed him to decide in a certain way that is contrary to what he thinks.<sup>440</sup> He may therefore decide to stay away instead of going against the wishes of the appointing party. Another arbitrator may choose to stay away from signing the award simply because he dislikes his colleagues. This refusal to co-operate would be aimed at frustrating the work. The next course of action that the remaining members may take is dependent upon what the procedural law and governing arbitration rules provide.

The other reason why some members of the arbitral tribunal may refuse to sign the arbitral award is because they hold dissenting views from those of the majority. Some arbitration rules such as those of the SCC<sup>441</sup> may want all the views irrespective, to be reflected in the award, whilst other rules of arbitration such as the CPR Rules<sup>442</sup> may not wish any dissenting view to see the light of day. The dissenting view is however still filed and any party wishing to see it may still have access to it. In France however a dissenting opinion cannot be filed and can therefore not be viewed by the parties. Whilst the ICC Rules allows dissenting views to be published together with the award, the LCIA Rules do not allow the dissenting opinions to be part of the award. The dissenting views are instead annexed to the award and are provided separately to the parties.

Since the UNCITRAL Rules do not make any reference to dissenting views, the Iran-US Claims Tribunal modified Article 32(3) on adoption to allow dissenting views to be recorded as part of the award. The sentence that was added states that:

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<sup>439</sup> Caron (2006: 754)

<sup>440</sup> Footnote No. 239, page 109

<sup>441</sup> Article 32(4) of the SCC Rules

<sup>442</sup> Rule 14(3) of the CPR Rules



“...Any arbitrator may request that his dissenting vote ... and the reasons therefore be recorded.”<sup>443</sup>

From this discussion it is clear that the essential ingredients of an arbitral award are subject to the agreement of the parties. Consequently, the threshold for the validity of an arbitral award that may be required in one arbitration may not be as high as what may be required in another arbitration. What is common however in all arbitrations is for an arbitral tribunal to issue the parties with an arbitral award that is final and binding.

## II Types of Arbitral Awards

A number of legal systems as well as rules of arbitration that recognize international commercial arbitration recognize an arbitral tribunal's power to make different types of arbitral awards other than the final award. This part of the study will analyze some of the types of awards that a tribunal may be permitted to issue. As the study will show, some of the awards that deal with an aspect of the dispute in whole are final awards in themselves, whilst those others that require to be revisited may not be considered as final awards. In respect of those awards that are made in the course of the arbitration proceedings but which answer the issues raised by the parties completely, they are final though not made at the end of the arbitration proceedings. A final award is however made at the end of the arbitration proceedings when all the issues or the remaining issues in dispute are addressed by the parties and remedies granted. The doctrine of *res judicata* becomes applicable to issues that are resolved in whole by an arbitral tribunal. Where a tribunal deals with an issue relating to liability in finality before it completes dealing with an issue relating to damages, the question of liability may be *res judicata*.

An arbitral tribunal's award made during the course of the arbitral proceedings that is not in full settlement of an issue is termed differently by different institutions and legal systems. International commercial arbitration practitioners are agreed on the fact that a decision of an arbitral tribunal that does not completely resolve an issue cannot be termed a final award, as the issue will have to be revisited by the tribunal. It is the responsibility

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<sup>443</sup> Footnote No. 90, page 791

of an arbitral tribunal to clearly state in its decision whether an award made is interim or final. Mr Justice Steyn as he then was, in the case of *Three Valleys Water Committee v. Binnie and Partners*<sup>444</sup> found that an arbitral tribunal's interlocutory decision on a procedural point amounted to an order unless the interlocutory decision resolved a substantive issue.<sup>445</sup>

In the case of *Nirma Ltd v. Lurgi Energie und Enstorgung GmbH*<sup>446</sup> the High Court of Gujarat held that a partial award on jurisdiction was a mere arbitral order. In the case of *ABC International v. Diverseylever*<sup>447</sup> the court held that the order of the arbitral tribunal refusing the interim payment could not be challenged before French courts, as it was not an award. The court went further to state that an award was something that put an end to the proceedings and dealt with the merits of the case by disposing of the issues in dispute between the parties.

The Model Law permits an arbitral tribunal to make more than one type of decision.<sup>448</sup> It requires a final award to be made by the majority of the arbitrators in the tribunal and for decisions relating to procedural issues to be dealt with by a presiding arbitrator.<sup>449</sup>

*"The UNCITRAL Model Law does not provide expressly that the arbitral tribunal has the power to make partial, interlocutory, preliminary, or interim awards. However, the travaux préparatoires, which may be used to assist interpretation of the UNCITRAL Model Law, indicate that the draftsmen intended that the arbitral tribunal have such a power."*<sup>450</sup>

Most countries that have adopted the Model Law permit arbitral tribunals to make different types of awards. For instance the Arbitration Act of Singapore<sup>451</sup> recognizes the different types of awards that an arbitral tribunal is able to make but excludes orders.

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<sup>444</sup> (1990) 52 BLR 42

<sup>445</sup> Redfern (2004: 354): "... a preliminary award may be treated as 'provisional'. However,... any decision that is not finally determinative of the issues with which it deals should not be called an 'award'".

<sup>446</sup> (2003) XXVIII Ybk Comm Arbn 790-809

<sup>447</sup> Footnote No. 349

<sup>448</sup> Article 33(3) of the Model Law

<sup>449</sup> Footnote No. 56

<sup>450</sup> Holtzmann (1989: 868)

<sup>451</sup> Footnote No. 420, Section 19A (1) & (2)

The Netherlands<sup>452</sup> also permits an arbitral tribunal to make different types of arbitral awards. Scotland also gives power to an arbitral tribunal to make additional awards.<sup>453</sup> The English Act on the other hand, permits an arbitral tribunal to make different types of awards in the same arbitration relating to different aspects of the dispute.<sup>454</sup>

The UNCITRAL Rules also permit an arbitral tribunal to make different types of arbitral awards apart from the final award.<sup>455</sup> The ICC Rules also gives an arbitral tribunal the power to make more than one decision,<sup>456</sup> although it does not expressly state which type of awards that an arbitral tribunal may make. Whilst the arbitral tribunal has got an inherent power to make a final award, the power of the arbitral tribunal to make other types of award during the course of the proceedings may be provided by the local laws. This provision may not necessarily be in an arbitration agreement. The discussion hereunder will analyze some of the awards that a tribunal may award and when it may be appropriate to do so. In the course of the discussion a differentiation will be made between an arbitral award and an order.

## II.1 Preliminary Awards

An arbitral tribunal may make a preliminary award when presented with an issue that requires such an award. The English Act<sup>457</sup> as well as the Model Law,<sup>458</sup> give power to a tribunal to deal with preliminary issues. A tribunal may make a preliminary award when dealing with a question of law such as the determination of the substantive law of the contract. The stage of the proceedings when such a question may be resolved depends on when it is raised. It also depends on the views of the tribunal. It may also further be dependent on whether an arbitral tribunal wants to make a preliminary award or a final award. If a party raises this question in the form of a preliminary issue, then an arbitral

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<sup>452</sup> Article 1049 of the Netherlands Arbitration Act

<sup>453</sup> Footnote No. 7, Article 33(3)

<sup>454</sup> Footnote No. 345

<sup>455</sup> Footnote No. 359

<sup>456</sup> Article 31(2) & (3) of the ICC Rules: "2. ...Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings. 3. The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

<sup>457</sup> Section 31(1) of the English Act

<sup>458</sup> Footnote No. 39

tribunal may also choose to make a preliminary award if it chooses to resolve the issue immediately.

A preliminary award results from a tribunal dealing with a preliminary issue and making the award during the course of the proceedings. If however a tribunal deals with a preliminary issue and then includes its decision in the final award the resulting award is not a preliminary award but a final one as it deals with the issue completely. There are issues for example such as the determination of the language to be used in the arbitration proceedings that an arbitral tribunal may choose to deal with as a preliminary issue and makes a preliminary award. There may however be issues such as the determination of the validity of the arbitration agreement or the jurisdiction of an arbitral tribunal that are usually dealt with as preliminary issues by a tribunal where possible, but make its decision in the final award and not as a preliminary award.

## II.2 Interim Measures of Protection

The power of an arbitral tribunal to make an interim measure of protection is aimed at securing a claim. An interim measure of protection is aimed at securing the status quo and it is usually made to cover a specific period of time. As a decision that is made by the arbitral tribunal in the course of determining the substantive issues in the main action, an interim measure of protection may be either in the form of an order or an arbitral award. Unlike an award however, an interim measure of protection is in general not accompanied by any reasons although reasons may be required if it is framed in the form of an award. Under the English Act, an arbitral tribunal is only permitted to grant interim relief that it would be permitted to grant in a final award.<sup>459</sup> The interim measure<sup>460</sup> that an arbitral tribunal may give must be agreed upon and authorized by the parties and recognized by the *lex arbitri*.

The revised Model Law defines an interim measure as follows:

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<sup>459</sup> Sections 39(1) & 48 of the English Act

<sup>460</sup> Footnote No. 7, Article 9(2)

*“An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*

- (a) Maintain or restore the status quo pending determination of the dispute;*
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*

*Preserve evidence that may be relevant and material to the resolution of the dispute.”*<sup>461</sup>

It must be stated that an interim measure of protection is much wider than an interim measure as provided by the revised provisions of Article 17(1) of the Model Law<sup>462</sup> in that the interim measure basically provides for the preservation of evidence and the maintenance of the status quo. In the case of *Coppee Lavalin*,<sup>463</sup> the court stated that an interim measure of protection could be said to be capable of fulfilling three objectives being:

- (1) filling a gap in the absence of arbitrators;
- (2) maintaining the status quo thus preventing a party from changing the circumstances in such a way that even an award would fail to provide the desired remedy, and;
- (3) giving remedies designed to make sure that the award has the intended practical effect.

The Dervaird Committee recommended that an interim measure of protection should for all intents and purposes be treated as an interim award, which may also be a complete award.<sup>464</sup> Under the Model Law, a party applying for an interim measure of protection must establish that he is likely to suffer irreparable damage and that there is a likelihood of him succeeding in the main hearing of the dispute. An arbitral tribunal weighs this evidence using its own discretion.<sup>465</sup> An arbitral tribunal has got the power to dismiss a

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<sup>461</sup> A/CN.9/592, Article 17(1)

<sup>462</sup> *ibid*

<sup>463</sup> Footnote No. 404

<sup>464</sup> Footnote No. 6, paragraph 3.23

<sup>465</sup> A/CN.9/592, Article 17 bis



claim provided security for costs<sup>466</sup> is not met by the party applying for an interim measure of relief.

The Model Law now permits an arbitral tribunal to order security for all loss in connection with an interim measure which power the arbitral tribunal did not always have.<sup>467</sup> An arbitral tribunal's exercise of its power to order interim measures of protection has its limitations in that an arbitral tribunal does not have any power to enforce its order. Although the new Article 17 of the Model Law has been approved by the United Nation's General Assembly, it does not have automatic effect on Model Law countries. In fact there is no country to date that has modified its arbitration laws and adopted the revised Article 17. It still needs to be seen whether countries will revise their arbitration laws and implement the revised Article 17 at which point the courts will be permitted to enforce interim measures.<sup>468</sup>

The substance of an interim measure as provided by Article 17(1) is limited in its application, as a party may not apply for an interim measure without the knowledge of the other party. This is because Article 18 of the Model Law demands that parties be treated with equality.<sup>469</sup> This causes problems to the effective application of Article 17(1) as a party that wishes to apply for an urgent order of an interim measure, without the knowledge of the other party may not be able to do so.

Sometimes the knowledge possessed by the other party of an intended application of an order of interim measure may cause that other party to take steps to defeat any interim measure. An *ex parte* order for an interim measure under Article 17(1) that is made by an arbitral tribunal cannot be enforced until after forty-eight hours have elapsed from the time that it is made. It cannot in essence be enforced until after there has been an *inter partes* hearing. This is in recognition of Article 18 of the Model Law. Consequently, the

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<sup>466</sup> Section 41(6) of the English Act

<sup>467</sup> A/CN.9/592, Article 17(1) *sexies*

<sup>468</sup> *ibid*, Article 17 *novies*

<sup>469</sup> Footnote No. 116

urgency of the application under Article 17(1) is neutralized by the need to comply with Article 18 that is a fundamental provision that cannot be derogated from.

### II.3 Partial and Interim Awards

An arbitral tribunal may in practice use the terms interim award and partial awards interchangeably depending on what type of award it is permitted to make at each point in time.<sup>470</sup> But it is common to attribute partial awards to those segments of the dispute that are resolved fully by the arbitral tribunal.<sup>471</sup> One would therefore not be wrong to state that partial awards are final awards when they deal completely with a specific portion of a dispute. There is therefore no need for an arbitral tribunal to revisit a partial award that exhausts an issue, as it is final and *res judicata*. An interim award on the other hand may or may not be termed a final award, as it is usually liable to be revisited by the arbitral tribunal if a party challenges it. If however no party raises a challenge, the interim award may be a final award.<sup>472</sup> Sanders and Berg made a distinction between a partial award, an interim award and orders that reads as follows:

*“...partial awards are given in respect of substantive issues which are separated, such as liability and quantum; interim awards are given on jurisdictional issues; and simple orders are made in respect of procedural issues.”*<sup>473</sup>

In the *Lesotho Highlands*<sup>474</sup> case, Lord Steyn recognized an arbitral tribunal’s power to make interim awards. He stated *inter alia* that an arbitral tribunal had power to make a partial award or an interim award on any issue or matter before making a final award. An arbitral tribunal has got power to make an interim award at any time during the course of the arbitration proceedings pursuant to an application by the parties. There are two

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<sup>470</sup> Schafer (2005: 119)

<sup>471</sup> Caron (2006: 793-795): “... in the practice of the Tribunal, the term ‘partial award’ was assigned to an award that was final as to a distinct claim, while the ‘interlocutory award’ was used to decide a substantive or procedural issue bearing on a claim.”

<sup>472</sup> *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1965] 2 All ER 4, page 10: Diplock LJ said that “An arbitrator today has power to make an interim award determining particular issues separately from other issues in the arbitration.”

<sup>473</sup> Redfern (2004: 352)

<sup>474</sup> Footnote No. 68, page 270

instances when an arbitral tribunal may be required to make an interim award. The first instance is when an issue needs to be settled before the full exploration of the main dispute can continue. The second instance is when there is cause for the status quo to be maintained and to that end a party makes an application for a provisional measure of relief. An example is an application for an interim injunction. Such an application can be varied or withdrawn by a party making the application.

The first instance can lead to a final award in relation to the item raised if it is settled once and for all and there is no cause for the parties to refer to it again. If however, the application is such that the need arises for the same issue to be determined in the final award, then the award remains an interim one. In relation to the second instance, such an award will always remain an interim one if it is made to temporarily protect the interests of a party in the interim period. Interim awards are not always monetary as they relate to the rights of the parties in most cases.

An example of a time when an arbitral tribunal may be required to make a partial award is when an application to challenge its jurisdiction is made. Some awards are termed interim as there is a likelihood of them being superseded by another award during the course of the arbitration proceedings. Since the principle of *competence-competence* requires that an arbitral tribunal make a decision relating to an application challenging its jurisdiction in the first instance, a partial award may ensue from such a hearing. An award made by an arbitral tribunal in response to the application may be final although it may have been made in response to an interim application. It may be final because the arbitral tribunal may not need to address it again.

An instance when an arbitral tribunal may be required to make an interim order is at the discovery stage of the proceedings when the other party refuses to produce documents that are considered critical to the claimant's case. This type of order though made in an interim application, may constitute a final decision on the question of the production of documents depending on the contents of the documents produced. If however, the party required to produce the documents still refuses to act, the arbitral tribunal may further

determine the issue at the end of the proceedings when making a decision on the merits of the case. An arbitral tribunal may only compel a party to produce documents with the assistance of a court in countries that provide for such a procedure.

#### II.4 Supplementary and Further Awards

The power of an arbitral tribunal to make a supplementary or further award is determined by governing arbitration rules and the procedural law pertaining. In the case of *Raymon L Loewen v. United States of America*<sup>475</sup> the United States requested the arbitral tribunal to make a supplementary award in order to clarify an issue in the award of the 26<sup>th</sup> June 2003. Eighteen months after the final award was made, the petitioner made an application for the vacation of the award. The respondent objected to the application basing their argument on the fact that the application was time barred as it was made three months after the final award. The petitioner's position was that the award of the 26<sup>th</sup> June, 2003 was not final for purposes of his application to vacate the award as a decision was still pending before the arbitral tribunal for an application for a supplementary award. The court held that arbitral awards are final and binding on the parties when issued, regardless of whether a request for a supplementary decision is filed.

A further award can be made to deal with other segments of the dispute. For instance in the *Kastner v. Jason*<sup>476</sup> the arbitral tribunal made a further award to quantify damages payable to Mr Kastner after having already made a supplementary award. In eight out of ten cases an arbitral tribunal makes a complete award in so far as a particular claim is concerned. The award so made in relation to a segment of the dispute is final in the sense that it is *res judicata* save for corrections and interpretation that are made within the prescribed period of time.

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<sup>475</sup> Case No. Civ.A.04-2151 (RWR) See also (Final Award 26<sup>th</sup> June 2003 (Mason, Mikva & Mustill, arbitrators) 42 ILM (2003) page 118

<sup>476</sup> Footnote No. 397

## II.5 Additional Awards

The life span of an arbitral tribunal's jurisdiction usually covers the period between its appointment and the date of making the award, unless unforeseen circumstances lead to the extension of that jurisdiction. Unforeseen circumstances may include the review or interpretation of the final award, or the correction of typographical errors.<sup>477</sup> In the case of *Danae Air Transport Societie Anonyme v. Air Canada*,<sup>478</sup> it was held amongst other things that the arbitral tribunal had made a mathematical error that amounted to a 'procedural mishap' as the method of calculation it used was outside the parties' contentions. The court based its decision to remit the costs award to the arbitrators for their reconsideration on the fact that there had been a procedural mishap although the decision itself was not wrong.<sup>479</sup>

An order that is made after the final award has already been made is usually termed an additional award. Additional awards may be made in circumstances where issues that are raised in the proceedings are omitted in the award. In such a case, an arbitral tribunal may exercise discretion and make an additional award in fulfillment of its objective.<sup>480</sup> The LCIA Rules also provide for a party to apply for an additional award in circumstances where a decision pertaining to a counterclaim is omitted from the final award.<sup>481</sup>

The English Act<sup>482</sup> permits an arbitral tribunal to make an additional award in respect of any claim including a claim for interest or costs, which claim is addressed by the parties in the proceedings but not dealt with in the award by the tribunal. The *Torch Offshore*<sup>483</sup> case deals with section 57(3)(b) of the English Act that gives power to an arbitral tribunal to make additional awards in respect of claims presented to the tribunal but not dealt with in the award. An arbitral tribunal can however not make an additional award in respect

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<sup>477</sup> Article 33(5) of the Model Law

<sup>478</sup> (2000) 2 All ER 649 at page 553-554

<sup>479</sup> *ibid*

<sup>480</sup> Footnote No. 382

<sup>481</sup> Article 27(3) of the LCIA Rules

<sup>482</sup> Section 57(3)(b) of the English Act

<sup>483</sup> Footnote No. 382



of claims not presented to it by the parties as this would amount to an excess of its jurisdiction.

## II.6 Final Award

The generally held position in international commercial arbitration is that an award is final and binding on the parties.<sup>484</sup> This includes a partial award if it is final in relation to the issue that it deals with.<sup>485</sup> It must be stated that every instrument that recognizes the process of international commercial arbitration as a means of resolving disputes also recognizes the power of a tribunal to make a final award. The finality of an arbitral award<sup>486</sup> under the Model Law is tested by it being able to withstand all the grounds for setting it aside provided by Article 34. In the *Kuwait v. American Independent Oil (Aminoil)*<sup>487</sup> case, the court set aside the award as it failed to take into account the factual and political circumstances in its award.

There are circumstances when an arbitral tribunal makes an *ex parte* award which if not challenged may amount to a final award. Such awards are made when no notice is given to the other party of the hearing dates or when a party makes an application without informing the other party. These are different from awards made in the absence of a party who has been informed of the date but fails to attend the hearing. For instance, The PRC Arbitration Law authorizes an arbitral tribunal to proceed with the hearing if a respondent fails to appear after having been duly summoned or if he abandons the proceedings midway.<sup>488</sup> Further, in the *Himpurna*<sup>489</sup> arbitration, Indonesia failed to file its case-in-chief and the tribunal proceeded with the arbitration proceedings in the absence of the other party.

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<sup>484</sup> op cit, Section 58

<sup>485</sup> Berger (2006: 554): "Only those arbitral decisions which decide, partially or wholly, on the subject matter of the arbitration, thus leading to a total or partial termination of the proceedings...can be characterised as genuine final arbitral awards..."

<sup>486</sup> Tweeddale (2005: 333)

<sup>487</sup> 21 I.L.M 976, 998 (1982)

<sup>488</sup> Footnote No. 175, Article 42 of the Section 3

<sup>489</sup> Footnote No. 239, paragraph 198

The making of a final award declares the close of proceedings and renders the arbitral tribunal *functus officio*.<sup>490</sup> An arbitral tribunal may be able to make a number of final awards in the same dispute if it is dealing with a complex issue with multiple claims. In such a case, a partial award that addresses a question of liability in full is a final award as well as a partial award dealing with the question of costs. In the *Sea Trade*<sup>491</sup> case, the court held that “there was nothing unfair in the tribunal deciding to deal with costs at a further hearing and in a further award.”<sup>492</sup>

An arbitral tribunal that makes a decision relating to a dispute that the parties wished it to resolve, establishes who is liable and also awards remedies, becomes *functus officio* as its mandate is exhausted. The exhaustion of an arbitral tribunal’s mandate is subject to the court ordering it to rethink or correct its decision, in which case it may still not be *functus officio* until the job is completed. In the case of *Husmann (Europe) Ltd v. Pharaon*,<sup>493</sup> the court held that a valid final award on the merits exhausted an arbitrator’s jurisdiction. Once the job is done, an arbitral tribunal cannot of its own accord re-visit an already decided case as it will no longer have jurisdiction to do so.

An arbitral tribunal that makes a decision in excess of its jurisdiction cannot be said to be *functus officio* as it may not have exhausted its jurisdiction if its award is declared invalid.<sup>494</sup> It is the responsibility of an arbitral tribunal to explicitly state in its award whether it has addressed all the issues arising in the particular segment of the dispute that it is answering, or if it still intends to revisit the same issues again later. If the arbitral tribunal states in the award that a particular question has been answered in full, then its decision becomes *res judicata* and the issue cannot be revisited as to its merits. As such the principle of *res judicata* cannot be a basis for challenging an arbitral tribunal’s jurisdiction as it only confirms that the issue that the parties had raised has received the arbitral tribunal’s full determination. An arbitral tribunal may in the alternative state that

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<sup>490</sup> Garner :“(Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished”

<sup>491</sup> Footnote No. 400

<sup>492</sup> *ibid* at page 649

<sup>493</sup> [2003] EWCA Civ 266, CA

<sup>494</sup> Tweeddale (2005: 764) :“An invalid award, such as one which has been made against a wrong party does not render the arbitral tribunal *functus officio*.”

a particular question has been answered in full but state in the award that it still intends to address the issue later in relation to the question of costs arising from that issue.<sup>495</sup> In such a case therefore, an arbitral tribunal's decision is not *res judicata*. In the case of *Wintershall A.G v. Government of Qatar*,<sup>496</sup> the arbitral tribunal agreed with the claimants that:

*"The principle of res judicata prevents the re opening of necessarily decided points. It does not prevent the clarification of a decision on points which an award has left undecided."*<sup>497</sup>

An arbitral tribunal's decision may only be *res judicata* in relation to that part of the dispute that has received the arbitral tribunal's final determination. If the issue that is *res judicata* relates to a procedural matter such as the question of its jurisdiction, then the arbitral tribunal still has power to make a decision on the merits of the case. The arbitral tribunal will continue to exercise its jurisdiction by establishing the parties' rights and obligations pertaining to the other segments of the dispute that still require its attention. An arbitral tribunal still has jurisdiction to alter or amend its own decision so long as it has not become *functus officio* in relation to the entire dispute.

An arbitral tribunal may face challenge for lack of jurisdiction from a party if it revisits a segment of the dispute after it has become *functus officio* as it will no longer have jurisdiction to do so.<sup>498</sup> Further any action done by an arbitral tribunal that is in excess of its jurisdiction is outwith whether it has finished its work or not. The making of a final award marks the date from which the period within which a challenge may be lodged against an arbitral award begins to count. This is applicable to partial awards that are made in the course of the arbitration proceedings, which are in essence final. The final award also marks the end of an arbitral tribunal's mandate unless circumstances arise that require the award to be revisited. In general however, an arbitral tribunal becomes

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<sup>495</sup> *Proodos Marine Carrier v. Overseas Shipping* [578 F. Supp. 207 S.D.N.Y. 919840]

<sup>496</sup> Footnote No. 228, para, 837-8

<sup>497</sup> *ibid*

<sup>498</sup> Section 67 of the English Act

*functus officio* after it has answered all the questions that the parties have raised in their disputes and it makes a final award.

#### II.6(i) Time Limit of Making a Final Award

The fixing of time limits within which a final award may be made is a procedural issue that is determined by the parties to an arbitration agreement. In cases where the parties choose to have their arbitration governed by a set of arbitration rules, the rules may provide such time limits. Under the ICC Rules, an arbitral tribunal has a duty of rendering an award to the parties within a period of six months.<sup>499</sup> This period is calculated as running from the date that the Terms of Reference are signed to the date of the award.<sup>500</sup> The UNCITRAL Rules on the other hand however, do not provide an arbitral tribunal with any time limit within which it may make a final award.

Where a time frame is prescribed within which a final award is to be made, an arbitral tribunal has a duty to abide by the prescribed time limit. The failure by a tribunal to meet the deadline of the prescribed time limit may render the proceedings irrelevant. Any time prescribed by the procedural law or the arbitration rules within which to make a final award can only be changed by the same means by which it is established. An arbitral tribunal has in general no power to alter the time within which it is to make a final award. But it may make a request for an extension of time from the parties, where extra time is required. The ICC Court may in certain circumstances extend the time limit even before a tribunal makes a request.<sup>501</sup> This is because the Court follows the proceedings keenly and therefore any reason that may lead to any delay is likely to be known to the Court.

The parties must agree to the extension of time and when permitted, an arbitral tribunal must aim to complete the arbitration within the time provided. If after exhausting the provided procedure for requesting an extension of time, a tribunal still fails to obtain such time, it may with the knowledge of the parties, apply to court for such extension under

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<sup>499</sup> Footnote No. 306

<sup>500</sup> *ibid*

<sup>501</sup> Footnote No. 308

the English Act.<sup>502</sup> In the case of *Pirtek (UK) Ltd v. Deanswood Ltd and another*,<sup>503</sup> the court held that the arbitrator had exceeded his jurisdiction by among other things making an additional award relating to interest 17 months after the final award. Deanswood Ltd failed to prove that it had made a claim for interest before the award was made. There was also no application before the court for an extension of the statutory time limit within which an award was to be made.

From this discussion it is evident that the basic role that a tribunal performs in relation to the time limits within which a final award may be made, is that of ensuring that it works within the prescribed time limits that are set by the parties. The power of fixing the time frame is, unlike other procedural powers, not transferred from the parties to the arbitral tribunal. The most that an arbitral tribunal may do is to request for an extension of time where permitted if it is unable to meet the deadline set for completing its work.

## CONCLUSION

This chapter has discussed the power of an arbitral tribunal to make an arbitral award. What was significant from the discussion is that the award that is made may only signify the completion of the tribunal's work if it restores the parties to the position that they were in before the dispute arose or in the alternative, addresses all contentious issues comprehensively. The award must be one that addresses and answers the issues that may have been in dispute between the parties and as such bind them to their agreement. Having complied with and fulfilled the requirements of the *lex arbitri*, the award must be one that is recognized by the said law as valid and therefore capable of being enforced. In order for an award to fulfill this objective, it must first of all be seen to have satisfied the essential elements of a valid award as required by the *lex arbitri*. Secondly, it must be a type of award that is binding on the parties and is final. This is vital as an arbitral tribunal makes a number of awards and orders during the course of the arbitration

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<sup>502</sup> Section 50(2) of the English Act

<sup>503</sup> (2005) 2 Lloyd's Law Reports 729 at page 734



process, but it is only the final arbitral award that is binding on the parties and is capable of terminating the arbitration process.

The study showed the need for a final award to meet the minimum standards required of a valid award. The arbitral tribunal has a duty to work towards attaining the threshold set by the *lex arbitri* upon which its validity may be based and upon the New York Convention being the treaty that enables it to be enforced across borders. Article IV(1)(a) of the New York Convention requires that a party wishing to apply for the enforcement and recognition of a final award produces '*a duly authenticated original award or a duly certified copy thereof*';<sup>504</sup> A final award must be in writing if this requirement is to be satisfied. A final award must further state the seat of the arbitration and the date of the award. The stating of the seat of the arbitration by the tribunal in its final award confirms the law that regulated its proceedings and the date signifies the effective date of application of the award. An award is made at the seat of the arbitration even though none of the arbitration proceedings take place there. The stating of the seat confirms the home of the arbitration proceedings. Although the date signifies the significant date of the award, it is only applicable on the parties from the date of service.

The decision to have an award with reasons is the prerogative of the parties. The parties may request that the reasons be attached to the award or be in a separate document. But the granting of reasons has been accepted as good practice in arbitration. The requirement of an arbitral tribunal to state its reasons for its award enables the parties to know the grounds upon which the award is based and why the tribunal may find it essential to rely on them. In instances where parties agree to an amicable settlement, a tribunal may not be able to state the reasons as the dispute is resolved based upon the parties' agreed terms and not upon a tribunal resolving the issues in dispute. However, because the amicable settlement of the dispute also resolves the dispute, the tribunal may if permitted reduce the parties' agreed terms to the form of a final award, but without reasons. In both cases however, the tribunal's power only terminates with a final award.

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<sup>504</sup> Article IV(1)(a) of the New York Convention

It is essential that a final award grants remedies to the parties as prayed. Whilst a tribunal must grant remedies in accordance with the agreement of the parties, the remedies must conform to the *lex arbitri*, as the parties may only enforce an award that has remedies that are recognized by the procedural law. The tribunal is only able to remedy the parties but is not in a position to compel the parties to abide by the remedies granted. In order for the final award to be enforced, a party must apply for enforcement in a court of the enforcing country. In cases where a tribunal makes an order that is not voluntarily complied with by a party, the other party may apply to the court at the seat of the arbitration for the enforcement of the order. This is because an order is not a final award and is made during the course of the arbitration proceedings. During the arbitration proceedings, a party may request a court at the seat of the arbitration to enforce an order as long as the application is territorial. An order of a tribunal that relates to a non-territorial clause may be enforced in a country other than the seat of the arbitration.

An arbitral tribunal may when requested, make an award that deals solely with the question of costs. If the award deals with the question of costs in finality and does not address the issue again, that award may be termed as a final segment of the award. Whilst the tribunal has got the power to award costs, the parties may in some cases agree on who is to bear the party to party costs. Further the rules of arbitration may also state the proportion in which the parties are to deal with the advance on costs. Where this guidance is available, the tribunal is obliged to abide by it. However, when there is a dispute relating to the question of costs, then it is for the tribunal to address the issue and remedy it in the form of an award.

An arbitral tribunal's final award may include an award of interest if a party requests for interest or if the circumstances of the case demand that a party may only be restored to his original position with an award of interest. For instance a delay in a monetary claim may invite an award of interest. Where the arbitral tribunal is permitted to make an award of interest, it is guided by the *lex arbitri* in its calculation of the interest. The agreement of the parties directs the tribunal to the currency that is to be applied to the arbitration proceedings and to the final award.

An arbitral tribunal's final award must be signed. Each system of law has got different standards that state how a tribunal may fulfill this condition. An arbitral tribunal may therefore be guided by the *lex arbitri* when determining whether it has fulfilled this condition or not. The Model Law for instance requires the signature of the majority of the arbitrators with reasons for showing why some signatures are missing. It may be helpful to the parties for dissenting views to be submitted to them in a separate document where this is permitted as this enables the parties to know the decision and views of each arbitrator.

Whilst an arbitral tribunal may make a number of orders and awards if permitted by the local laws during the course of the arbitration proceedings, the award that is termed as final must be one that resolves an aspect of a difference completely and grants remedies. That aspect of the difference need not be revisited as it is *res judicata*. An arbitral tribunal may therefore have more than one final award in any given arbitration process. The reason for this is that it may, in dealing with a complex problem for instance divide issues into segments and address them separately. As each issue is resolved and a remedy is granted, a final award is made. It is however important that the tribunal states the term that it wishes to attach to its decision to prevent any confusion. An arbitral tribunal however only exhausts its mandate when all the issues in dispute are addressed and resolved. The time within which an arbitral tribunal is to make a final award is of the essence and as a procedural issue it is determined by the parties.

## CHAPTER FOUR

### THE NATURE OF OBJECTIVE ARBITRABILITY AND THE POWER OF AN ARBITRAL TRIBUNAL TO DEFINE ITS JURISDICTION

#### INTRODUCTION

The aim of this chapter is discuss the extent of an arbitral tribunal's jurisdiction. Whilst chapters two and three dealt with the powers of an arbitral tribunal to resolve the parties' dispute and make an award respectively, this chapter discusses the extent of an arbitral tribunal's jurisdiction firstly, in terms of the issues in the dispute that it is permitted to deal with and secondly the scope of its authority. The discussion intends to show how an arbitral tribunal's power to deal with a subject matter in a dispute is determined by the extent of its jurisdiction. The study also shows how the statutory limitations that are placed on an arbitral tribunal's jurisdiction by a country's arbitration laws are maintained and enforced. The chapter also illustrates how the statutory limitations override the limits of an arbitral tribunal's jurisdiction that are drawn by the parties to an arbitration agreement.

The study begins by analyzing the concept of objective arbitrability that marks the extent of the parties' autonomy to determine the subject matter of their dispute. It signifies the boundary between the issues that the tribunal may resolve and the issues that are to be resolved by the judicial system of a particular country. It is now a commonly accepted position that disputes that arise in international business contracts may, subject to the parties' wishes, be resolved through the process of international commercial arbitration. This chapter will show that a State's public policy requirements may sometimes limit the parties' liberty to exercise their choice of issues that they are able to refer to arbitration. In dealing with a subject matter in dispute between the parties, an arbitral tribunal has to not only consider whether the dispute is within the scope of its authority, but also whether the law at the seat of the arbitration permits it to subject the dispute to the process of arbitration.<sup>505</sup>

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<sup>505</sup> Craig (2000: 63)

The study will end by discussing the power of an arbitral tribunal to rule on its own jurisdiction. Unlike objective arbitrability that focuses on the subject matter in dispute, an arbitral tribunal's power to rule on its own jurisdiction is wider in nature as it not only looks at whether it has power to deal with a subject matter in dispute, but at every aspect of its jurisdiction. It thus goes further to examine its very foundation. It is the position of this study that objective arbitrability and an arbitral tribunal's power to rule on its own jurisdiction both form a boundary of the issues in a dispute that an arbitral tribunal is able to deal with.

The test of arbitrability is therefore not just a court's determination of the question of arbitrability, but also an arbitral tribunal asking itself whether a subject matter in dispute lies within the scope of its authority. The Model Law<sup>506</sup> and the English Act<sup>507</sup> permit the subjection of the decision of an arbitral tribunal on the question of arbitrability to the control of a court at the seat of arbitration. The court may set aside an arbitral award if it finds that the dispute in question is not capable of being settled using the arbitration process under the law to which the parties have subjected it.<sup>508</sup> The discussion will show that the power of an arbitral tribunal in terms of the remedies available to it is limited as compared to the issues in the dispute that it is able to deal with. The reason being that some jurisdictions that would consider a subject matter to be arbitrable may not avail to a tribunal all the remedies that it would have wished to award a party under that arbitration.

This chapter contains three sections. The first section discusses the concept of objective arbitrability and what it entails. The second section discusses the limitations placed by a State's public policy on a party's autonomy to bring issues in a dispute to be resolved through the process of arbitration. The final section looks at the power of an arbitral tribunal to rule on its own jurisdiction.

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<sup>506</sup> Article 16(3) of the Model Law

<sup>507</sup> Footnote No. 498

<sup>508</sup> op cit, Article 34(2)(b)(i)



## 1.1 WHAT DOES THE CONCEPT OF OBJECTIVE ARBITRABILITY ENTAIL?

The concept of objective arbitrability relates to the question of the subject matter that is capable of being subjected to the arbitration process.<sup>509</sup> Simply put, arbitrability is the determination of whether a subject matter in dispute is capable of being referred to the process of arbitration or is not capable of being settled by arbitration.<sup>510</sup> In other words the determination of arbitrability in favour of arbitration enables an arbitral tribunal to exercise its power of resolving the parties' disputes through the process of arbitration. Arbitrability becomes an issue when the power to decide a subject matter that an arbitral tribunal purports to exercise is questioned.<sup>511</sup> A country's legislation pertaining to international commercial arbitration may provide the extent of an arbitral tribunal's powers and the powers that the tribunal may not have jurisdiction over.<sup>512</sup>

Alan Redfern and Martin Hunter describe arbitrability as follows:

*"Arbitrability,...involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts."*<sup>513</sup>

Julian Lew on the other hand describes arbitrability as:

*"...one of the issues where the contractual and jurisdictional natures of international commercial arbitration meet head on. It involves the simple question of what types of issues can and cannot be submitted to arbitration."*<sup>514</sup>

Peter Binder agrees entirely with Julian Lew's description of arbitrability.<sup>515</sup> What he sees as causing a problem with the term arbitrability is that one cannot be sure of what is arbitrable and what is not in any given jurisdiction. Craig, Park and Paulsson believe that

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<sup>509</sup> Nakamura (2002: 206)

<sup>510</sup> Binder (2005: 26): "Whether a dispute is arbitrable or not, , ...is commonly determined by a state's national laws or by its constitution."

<sup>511</sup> Park (2006: 87): "...the catchall term "arbitrability" can cover several elements of the arbitrator's power to hear a dispute..."

<sup>512</sup> Section 4(1) of the English Act: "The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary."

<sup>513</sup> Redfern (2004: 138)

<sup>514</sup> Lew (2003: 187)

<sup>515</sup> Binder (2000: 232): "The main problem identified in the context of the issue of arbitrability is the uncertainty involved in the determination of matters deemed to be non-arbitral by the individual jurisdictions."

the concept of arbitrability should be *“limited to the inquiry of whether the claims raised are prohibited by law from being resolved by arbitration- irrespective of the otherwise undoubted jurisdiction of the arbitral tribunal.”*<sup>516</sup> Lord Mustill states that a consensus opinion on matters that are arbitrable is far fetched.<sup>517</sup> These positions confirm the inconsistencies<sup>518</sup> in the approach to the question of arbitrability as whilst they assert that drawing a list of common factors is bound to fail, attempts have been made by some countries to identify common features in the issues that are arbitrable. For instance, Switzerland permits any disputes that have property as a subject matter in the dispute to be referred to arbitration.<sup>519</sup> Germany also recognizes a claim with its seat in Berlin and involving an economic interest to be arbitrable.<sup>520</sup>

Professor Hanotiau on the other hand considers arbitrability to be a condition of the validity of the arbitration agreement and consequently, of the arbitrator’s jurisdiction.<sup>521</sup> His description of arbitrability shows that in order for the question of arbitrability to be answered, a lot of other factors such as the validity of the arbitration agreement<sup>522</sup> and the jurisdiction of the arbitral tribunal have to be taken into account. If an arbitration agreement relates to an issue in the subject matter of the dispute that is not arbitrable under the laws of the country which the parties wish to subject their arbitration to, then that arbitration agreement will be invalid in that country. The same arbitration agreement may however be considered as valid if the parties choose to subject it to the laws of another country that considers the issues in the subject matter to be arbitrable.

This study takes the position that there is a direct correlation between the question of objective arbitrability and the jurisdiction of an arbitral tribunal. It is for this reason that this study has chosen to discuss these two areas together. Objective arbitrability and the question of an arbitral tribunal’s jurisdiction both focus on one issue which is that of defining the extent of an arbitral tribunal’s power to deal with the issues of dispute

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<sup>516</sup> Redfern (2004: 60)

<sup>517</sup> Mustill (2001: 71)

<sup>518</sup> *ibid*, page 70

<sup>519</sup> Art, 177(1) Swiss PILA of 1987

<sup>520</sup> Section 1030 ZPO

<sup>521</sup> Hanotiau (1996: 391)

<sup>522</sup> Berger (2000: 319)

between the parties. Both areas therefore draw a boundary of where the power of an arbitral tribunal ends, thus defining the disputes that it is capable of resolving.

The jurisdiction and powers of an arbitral tribunal are subject to the validity of the arbitration agreement.<sup>523</sup> A court may determine arbitrability in relation to the validity and scope of the arbitration agreement. Where an issue is arbitrable but the arbitration agreement is invalid, the court may determine the issue. In the case of *First Options of Chicago v. Kaplan*,<sup>524</sup> the court held that the scope of the arbitration agreement was a matter for courts to decide independently. In the case of *Dalimpex Ltd v. Janicki*<sup>525</sup>, the court stated that it had jurisdiction to decide a case where an arbitration agreement was invalid.

The starting point of determining objective arbitrability therefore, is firstly, whether there is in existence a valid arbitration agreement that relates to a dispute capable of being resolved through the process of arbitration. The second position is that of ensuring that the question of arbitrability is raised in a country that has jurisdiction over the respondent in order for the judicial mechanism in that country to compel the respondent to honour the arbitration agreement. The determination of the question of objective arbitrability must therefore be by a court in the country where the question is raised. There is a generally held presumption that an arbitration agreement is valid and the dispute that the parties subject to the process of arbitration is one that is capable of being settled through arbitration. In the case of *Moses H Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>526</sup> the court held that doubts that may arise concerning the scope of arbitrable issues should be resolved in favour of arbitration.

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<sup>523</sup> Article 17 (2) of the ICC Rules

<sup>524</sup> 115 S. Ct. 1920 [1995]

<sup>525</sup> [2003] 172 OAC 312

<sup>526</sup> 460 US 1, 24-25 [1983]

## 1.2 The Stages at Which the Question of Objective Arbitrability may be Raised

The question of objective arbitrability may be raised at any of the following times:

- (i) Before the arbitral tribunal is constituted;
- (ii) After the award is made; and,
- (iii) When enforcement is sought.

In determining the question of arbitrability, the main factor that has to be taken into consideration is the system of law that is applicable to the arbitration at the stage when the question is raised. This part of the study looks exclusively at three stages of the arbitration when the question of objective arbitrability may be raised. It is the position of this study as will be discussed at the end of the chapter that any question that is raised relating to the jurisdiction of an arbitral tribunal during the course of the arbitration proceedings, lies in the exclusive domain of an arbitral tribunal at least in the first instance. The question of arbitrability amounts to a challenge of the decision to subject an issue in dispute to the process of arbitration by a party to an arbitration agreement. A party is obliged to raise the question of objective arbitrability immediately he becomes aware of the issue that is the subject of the question of objective arbitrability.

### 1.2 (i) Objective Arbitrability Raised Before the Constitution of the Arbitral Tribunal

The issue of objective arbitrability at this stage of the arbitration could arise at the determination of the validity of an arbitration agreement. At this stage of the arbitration proceedings, the arbitral tribunal will still not have taken over the realms of power. The place of arbitration may or may not have been decided upon by the parties. A party may bring a court action in disregard of the arbitration agreement. In such a situation the other party may in defence request that the matter be referred to arbitration.

A party may wish to raise the question of objective arbitrability at this stage if there is evidence to show that the other party is not ready to honour the arbitration agreement by purporting that the arbitration agreement is defective or non-existent. The New York

Convention requires that a court in a Contracting State faced with the question of objective arbitrability send the parties to arbitration if the issue in their dispute is arbitrable under the law of the said State.<sup>527</sup> The court may assume jurisdiction to determine the dispute if it decides that the arbitration agreement is “null and void, inoperative or incapable of being performed.”<sup>528</sup> In the case of *A Best Floor Sanding Pty v. Skyer Australia Pty Ltd*<sup>529</sup> the court found that the arbitration agreement was null and void. In cases where the court finds that the arbitration agreement is null and void, it may assume jurisdiction of the matter and adjudicate.

A court’s determination of whether or not an issue should be referred to arbitration amounts to a determination of the question of objective arbitrability. Both the Model Law<sup>530</sup> and the English Act<sup>531</sup> give recognition to the New York Convention’s position referred to above.<sup>532</sup> The Model Law’s position may be likened to that of France although France is a non-Model Law jurisdiction.<sup>533</sup>

If the country before whose court the claimant brings proceedings has adopted Article 8(1) of the Model Law, it is obliged to determine the question of objective arbitrability if it is requested to do so by a party subject to the terms provided therein. If such a court recognizes the issues in the subject matter of the dispute as arbitrable by its own laws, it must refer the parties to arbitration. The case of *Rio Algom Ltd v. Sammi Steel Co.*<sup>534</sup> defined the role that a court assumes before the commencement of arbitration proceedings, as being confined to determining the validity of the arbitration agreement pursuant to Article 8 of the Model Law. In the case of *Green Tree Financial Corporation v. Lynn Bazzle*<sup>535</sup>, the court stated that:

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<sup>527</sup> Article II(3) of the New York Convention

<sup>528</sup> *ibid*

<sup>529</sup> [1999] VSC 170

<sup>530</sup> Article 8(1) of the Model Law

<sup>531</sup> Section 9(4) of the English Act

<sup>532</sup> Binder (2005: 88): “...a party can even rely on Article 8 where the *lex loci* is in a different state, with the only connection to the adopting state being, perhaps, that the court action was brought there.”

<sup>533</sup> French Code of Civil Procedure, Article 1458

<sup>534</sup> [1991] 47 C.P.R. (2d) 251; CLOUT.

<sup>535</sup> 531 US 79, 90, 121 S. Ct. 513, 522 [2000]



*“in the absence of clear words to the contrary it was to be assumed that it was the courts and not the arbitrators who determined questions such as whether the parties have a valid arbitration agreement.”*<sup>536</sup>

The powers of an arbitral tribunal to determine whether it is permitted to deal with a specific issue in a subject matter have to be clear and precise.<sup>537</sup> When this question is raised before the constitution of an arbitral tribunal, the court in the country where the respondent is domiciled deals with the issue. The essence of objective arbitrability at this stage of the proceedings is to ensure that the parties that choose the process of international commercial arbitration as a means of resolving their disputes honour their arbitration agreement. The court will therefore be playing the role of holding the parties to their part of the bargain.

#### 1.2 (ii) Objective Arbitrability Raised After the Making of an Arbitral Award

The arbitral tribunal has a primary responsibility of ensuring that the award that it draws is valid at the seat of the arbitration. Once an arbitral tribunal is made, the tribunal's work will in general have come to an end. Consequently, the question of objective arbitrability at this stage of the arbitration may only be raised by a party before a court in the form of a challenge against the award. The challenging of an arbitral award under the Model Law is very restrictive in nature in the sense that the only permitted recourse against an arbitral award is setting it aside under very restricted grounds.<sup>538</sup> As the validity of an arbitral award under the Model Law is determined by the *lex arbitri*, the question of objective arbitrability at this stage of the arbitration proceedings may only be raised at the seat of the arbitration. The Model Law does not provide for courts in other jurisdictions to set aside an award that is made in another State,<sup>539</sup> save for a few exceptions such as the Indian legal system. In spite of it being a Model Law jurisdiction, the legal system in India permits the setting aside of an arbitral award that is made in another country.

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<sup>536</sup> Tweeddale (2005: 227)

<sup>537</sup> Binder (2005: 148)

<sup>538</sup> Footnote No. 356

<sup>539</sup> Article 1(5) of the Model Law

The Model Law may permit the question of objective arbitrability to be raised at this stage of the arbitration only pursuant to the following provisions:

- Article 34(2)(a)(iii) of the Model Law, which states that:

*“An arbitral award may be set aside by the court... only if the party making the application furnishes proof that the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;”*<sup>540</sup>

- Article 34(2)(b)(i) of the Model Law, which states that:

*“An arbitral award may be set aside by the court specified in article 6 only if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State;”*<sup>541</sup>

These provisions permit a court at the seat of the arbitration to set aside an arbitral award on the ground of arbitrability where such a case is established. The raising of the question of objective arbitrability at this stage of the arbitration proceedings is a test of an arbitral tribunal’s jurisdiction to deal with a particular subject matter in a dispute between the parties. Where the court decides that the matter is arbitrable, that is a confirmation that the arbitral tribunal worked within its jurisdiction when it dealt with the issues in dispute. If however, the court rules that the matter is not arbitrable at the seat of the arbitration, the arbitral tribunal may have acted out-with its jurisdiction.

## 1.2 (iii) Arbitrability Raised at the Stage of the Recognition and Enforcement of an Arbitral Award

After an arbitral award is made and handed to the parties, a successful party may wish to have the award recognized and enforced in the country where the unsuccessful party has

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<sup>540</sup> *ibid*, Article 34(2)(a)(iii)

<sup>541</sup> Footnote No. 508

assets.<sup>542</sup> The unsuccessful party may raise the question of objective arbitrability at this stage as a ground for resisting the enforcement and recognition of the award. The New York Convention requires that the recognition and enforcement of the award be done in accordance with the rules of procedure in the State where enforcement is sought.<sup>543</sup> The Model Law and the English Act both recognize the question of objective arbitrability as a defence that an unsuccessful party may raise against the recognition and enforcement of an arbitral award.<sup>544</sup>

The English Act states that:

*“Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”*<sup>545</sup>

These two provisions echo Article V(2)(a) of the New York Convention which states that:

*“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country;”*<sup>546</sup>

Article V(2)(a) referred to above must be read together with Article II(1) of the Convention when applying it to the determination of the question of objective arbitrability.<sup>547</sup> This is because an arbitral award that does not meet the standards set by Article II(1) may not be recognized or enforced as it will have failed to meet the defence in Article V(2)(a).

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<sup>542</sup> Footnote No. 342, Article I

<sup>543</sup> Article III of the New York Convention: “Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon....”

<sup>544</sup> Footnote No. 904

<sup>545</sup> Section 103(3) of the English Act

<sup>546</sup> Article V(2)(a) of the New York Convention

<sup>547</sup> *ibid*, Article II(1)

The provisions referred to above show that if the question of objective arbitrability is raised at this stage of the arbitration, it is a court in the State where the enforcement and recognition of the arbitral award is sought that determines it.<sup>548</sup> This approach guarantees the enforcing State the opportunity of ensuring that its courts only recognize and enforce those arbitral awards that are the product of matters considered arbitrable under its laws. This could be useful in protecting the legitimate interests of a forum in ensuring that certain sensitive or public interest matters are removed from the scope of private arbitration.

Although the New York Convention, the Model Law or the English Act do not expressly state the law that is to govern the question of objective arbitrability at this stage of the arbitration, it would be correct to conclude that it is that of the enforcing State. Reason being that the arbitration is non-territorial at this stage and consequently each country where enforcement may be sought may wish to apply its own legal standards. As such an arbitral award that is not enforced in one State may be enforced in another State as long as the party against whom enforcement is sought has got assets or jurisdiction in that State. For instance, the fact that a dispute relating to matrimonial proceedings is arbitrable in Libya does not mean that England has to also consider matrimonial matters as arbitrable.<sup>549</sup> In Ireland “arbitration is usually believed to be unavailable in the fields of crime, family law and constitutional matters.”<sup>550</sup>

Where an arbitral award is recognized as valid at the seat of the arbitration, the fact that it is not enforceable in a country where a losing party has assets does not prevent the successful party from applying for its enforcement in another country where the respondent has assets. Conversely, if the arbitral award is set aside at the seat of the arbitration, the New York Convention may permit refusal of the recognition or enforcement of such an award in any of its Contracting States. Article V(1)(e) states that:

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<sup>548</sup> Blanch (2006: cxlvi): “At the recognition and enforcement stage,..., a national court should... seek to ensure that the hearing was conducted as the parties agreed and that each party has had an opportunity to present its case.”

<sup>549</sup> Tweeddale (2005: 107)

<sup>550</sup> Reichert (2006: 151)

*“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”*<sup>551</sup>

In the case of *Fincantieri – Cantieri Navali Italiani SpA and Oto Melara SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*,<sup>552</sup> the court in Genoa dealt with disputes relating to a United Nation’s embargo on Iraq. It is evident from the discussion that the question of objective arbitrability is raised by a party in court at the commencement of the arbitration proceedings and at the end of the arbitration, as an arbitral tribunal is not in control of the arbitration during these times.<sup>553</sup>

It is therefore correct to conclude that different national systems of law dictate how far parties to an international commercial arbitration agreement can utilize their autonomy in determining the kind of disputes that may be subjected to the process of arbitration. This conclusion marks the boundaries of the powers of an arbitral tribunal in as far as its jurisdiction is concerned. Arbitrability when looked at in this sense becomes a meeting point of the jurisdiction of the arbitral tribunal in its effort to determine a dispute before it on the one hand, and the extent of the contractual freedom that the parties are given by the national system of law on the kinds of subject matters that are arbitrable on the other hand. A country’s social, political and economic policies influence the determination of arbitrability. That is why an issue that is arbitrable in one country may be considered as not arbitrable in another country. The Supreme Court in Belgium stated in the case of *Colvi v. Interdica*<sup>554</sup> as follows:

*“Article II (3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York) Convention, although not explicit about the law under which arbitrability is to be decided, allows a national court to decide the question of arbitrability by reference to its own legal system.”*<sup>555</sup>

<sup>551</sup> Article V(1)(e) of the New York Convention

<sup>552</sup> XXI YBCA 594 [1996] 13

<sup>553</sup> Blanch (2006: cxlvii): “..the question of whether a dispute is arbitrable arises at two points in the arbitration process: the first is when the arbitration commences; and the second is at its conclusion.”

<sup>554</sup> Court of Cassation [15 October, 2004]

<sup>555</sup> *ibid*



It is clear from this judgment that a national court may deal with matters relating to international commercial arbitration differently from matters that fall under its jurisdiction as it acknowledges that it is an arbitral tribunal that has jurisdiction over arbitration issues. Julian Lew states, in reference to this issue that:

*“most national laws contain provisions for the procedures to be adopted in international arbitration which deviate from the rules to be applied by national courts. These provisions allow wide freedom to the parties and the arbitration tribunal to determine the procedure to be followed.”*<sup>556</sup>

By being able to determine the question of arbitrability, courts play an important role in supporting the process of arbitration. National systems of law ensure the enforcement of the arbitration agreement, provide assistance to the arbitration proceedings, and ensure the recognition and enforcement of arbitral awards. Without this support, awards would be unenforceable in circumstances where a losing party does not want to willingly abide by the terms of the arbitral award. Although national systems of law are not part of the process of arbitration, they occupy a central place in arbitration that ensures its survival.

Lord Wilberforce once stated during the second reading of the English Arbitration Bill in the House of Lords that:

*“...I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law...”*<sup>557</sup>

It is the position of this study that the process of international commercial arbitration is a freestanding system that is subject to systems of law that regulate the extent of powers that an arbitral tribunal is able to exercise in any given country. This arises from the fact that an arbitral tribunal lacks a *lex fori* and is thus subject to the regulations of the governing legal systems. National systems of law in addition regulate the extent of the parties' autonomy, as the award that emanates from their chosen system of dispute resolution, must be enforceable at law. The parties' choice of issues that they may subject

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<sup>556</sup> Lew (2003: 523)

<sup>557</sup> Hansard, 18 January 1996 {568 HL Official Report (5<sup>th</sup> series), col 778}

to the process of arbitration, must be in tune with the public policy interests of a country where they wish to subject their arbitration.

## II. PUBLIC POLICY LIMITATIONS ON A PARTY'S AUTONOMY TO SUBJECT ISSUES IN A DISPUTE TO THE PROCESS OF ARBITRATION

An arbitral award may be set aside if a court at the place of arbitration holds that the arbitral award violates the public policy of that country. The determining factor for such a decision may be different from country to country, as each country has its own concept of what is required by its mandatory public policy interests. This state of affairs explains why one country may accept a challenge of an arbitral award based on the ground of it being inarbitrable, which dispute may be regarded as arbitrable in another country. It is situations such as these that have contributed to the development of the concept of international public policy. A distinction between national and international public policy was drawn in the case of *General Electric Co. v. Renusagar Power Co. Ltd.*<sup>558</sup> Some countries have taken steps to establish regulations encompassing this concept. The most notable of these are France, Switzerland, Germany and Portugal.<sup>559</sup> The New French Code of Civil Procedure<sup>560</sup> for example permits the setting aside of an arbitral award on the ground of its being contrary to international public policy.

“Zimbabwe and Zambia did in 1996 and 2000 respectively include in their legislation a list of issues that are not arbitrable. The lists include criminal and matrimonial matters, and agreements in violation of their rules of public policy.”<sup>561</sup> The United States like most modern states has considerably broadened the kinds of disputes that are arbitrable. Such guidelines go a long way in assisting parties who are from different jurisdictions to have an idea of the issues that can be subjected to the process of international commercial arbitration in those countries.

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<sup>558</sup> [1994] AIR 860

<sup>559</sup> Portuguese Code of Civil Procedure [1986] Article 1096(f)

<sup>560</sup> Footnote No. 533, Article 1502.5

<sup>561</sup> Sanders (2005: 475-6)

It is a generally held position in international commercial arbitration for courts to consider the ground of public policy whenever an arbitral award is brought before the courts for scrutiny.<sup>562</sup> The United States court in the *Mitsubishi*<sup>563</sup> case recognized as arbitrable a dispute involving anti-trust claims, as the ensuing award did not conflict with the US public policy.<sup>564</sup> An English court also stated that the public policy of sustaining arbitral awards outweighed the public policy of discouraging international commercial corruption.<sup>565</sup> Switzerland recognizes as arbitrable disputes involving an economic interest.<sup>566</sup> Ontario holds public policy as a fundamental and most basic principle of justice and fairness and an arbitral award made there that is contrary to morality or includes some iota of corruption may be set aside by the court.

In the case of *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*<sup>567</sup> the court stated that 'international public policy' meant those elements of a State's own public policy which are so fundamental to its notion of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element. The failure to raise a public policy ground before a court at the seat of arbitration does not prevent a party from resisting enforcement in the enforcing country on the same ground.<sup>568</sup> This is because each country applies its own public policy considerations.<sup>569</sup> It is noteworthy that whilst some countries differentiate domestic public policy and international public policy, the New York Convention does not make such a distinction.<sup>570</sup> In the case of *Parsons and Whittemore v. RAKTA*<sup>571</sup> the United States Court of Appeal stated that:

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<sup>562</sup> Article V(2)(b) of the New York Convention: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country."

<sup>563</sup> Footnote No. 65

<sup>564</sup> Rivkin (2006: 400)

<sup>565</sup> *Westacre Investments v. Jugoimport-SDPR Holding Co. Ltd* [1998] 2 Lloyd's Rep. 111 at page 131

<sup>566</sup> Article 177 of the Swiss Private International Law Statute

<sup>567</sup> [1999] 2 HKC 205

<sup>568</sup> Tweeddale (2005: 392): "For a defence of public policy to succeed a party needs to show that there is some element of illegality or that the enforcement of the award would be 'clearly injurious to the public good'..."

<sup>569</sup> *op cit*, page 159.

<sup>570</sup> *Dutch Appellant v. Austrian Appellee* [1985] X Ybk Comm Arbn 421 at page 422

<sup>571</sup> 508 F 2d 969 (2d Cir 1974)

“...the convention’s public policy defence should be construed narrowly...”<sup>572</sup>

The discussion above shows how public policy<sup>573</sup> interests often limits party autonomy by determining the matters that are arbitrable and those that are not. The limitations in each country are subject to each country’s social, political and economic policies at any given time.<sup>574</sup> In general countries tend to place restrictions on the arbitrability of disputes that are tainted with corruption, bribery or money laundering.<sup>575</sup> There may be situations where a dispute may be arbitrable, but one of the parties is found to have met his part of the bargain under the contract by bribing some people. In a country where corruption is a crime, the arbitrability of such a dispute may be questionable.

On the other hand, a country that does not shun corruption may consider the same dispute as arbitrable. An award emanating from a dispute tainted with corruption though valid in the country where it is made may not be enforceable in a country that shuns corruption. Most countries do not allow commercial transactions to be conducted under the veil of corruption. A case at hand is the famous *Westacre*<sup>576</sup> case. This case underscored the fact that the need to suppress bribery and money laundering is an established part of international public policy that ought to be respected by an arbitral tribunal.

In the celebrated case of *Soleimany v. Soleimany*<sup>577</sup> the court refused to have an award enforced in England as it was based on an illegal contract involving the smuggling of carpets out of Iran into the United Kingdom as enforcing such an illegal contract would have been contrary to English public policy. Meanwhile, this was not the position with the Jewish law that governed the arbitration proceedings. Under Jewish law smuggling was not regarded as illegal and was therefore of no consequence to the rights of the parties to the contract. By virtue of the separability<sup>578</sup> doctrine, the arbitrator still had jurisdiction

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<sup>572</sup> *ibid*

<sup>573</sup> *Desputeaux v, Les Editions Chaouettes* [2003] 1 Supreme Court Reports 178 – ...the court... also endorsed a very narrow view of the public policy defense to arbitration and to enforcement of arbitral awards.

<sup>574</sup> Davidson, (2000: 61)

<sup>575</sup> Article 3 of the 1988 the Vienna Convention

<sup>576</sup> Footnote No. 565

<sup>577</sup> [1999] QBD 785

<sup>578</sup> Footnote No. 77

to determine the issue of illegality of the main contract. It is worth noting that unlike the *Westacre* case, the case of *Soleimany v. Soleimany* was a domestic arbitration. The *Soleimany* case however highlighted the fact that the governing issue of public policy is the ability to have enforced decisions made abroad.

It is important to note that a number of State laws though, allow the civil part of criminal disputes to be resolved through the use of the process of arbitration if that is what the parties desired. Professor Davidson has stated that:

*“matters of criminal liability may not be arbitrated, although there is no reason why the civil consequences of criminal behaviour should not be the subject of arbitration.”*<sup>579</sup>

Disputes that fall in the following categories are now generally considered as arbitrable.<sup>580</sup> These are matters relating to patents licences and trademarks; issues relating to antitrust and competition laws, fraud, corruption and securities laws. Europe for instance now supports arbitrability of disputes involving corruption and bribery. In the case of fraud, because accounting is a highly technical field it is more susceptible to national legislation than to international regulation. Fraud has to some extent not been the subject of the same degree of international cooperation and rule making as bribery and money laundering.

Whilst being alive to the international public policy implications, it is still felt that an arbitral tribunal should be allowed to determine issues relating to corruption or bribery. This can be done whilst keeping in mind the autonomy principle. Therefore, whereas courts can deal with corruption and bribery in the main contract if a country considers them to be non-arbitrable by virtue of its public interest concerns, the arbitral tribunal should be in a position to deal with the civil consequences of corruption and bribery arising in the arbitration agreement. Whilst this may apply to some countries, there are still other countries that consider bribery and corruption as non-arbitrable in whatever form, shape or manner.

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<sup>579</sup> Davidson (2000: 61)

<sup>580</sup> A/CN.9/460 paragraphs 32-34: The Working Group has suggested that it should call on each country to list the issues which that country considers are not arbitrable. In this way parties to an international contract will know whether their disputes are capable of settlement by arbitration at the seat of the arbitration and if their awards are likely to be enforced.



A country may decide on the issues that can be arbitrated upon and the issues that should be dealt with exclusively by its courts subject to its own national system of laws whilst taking into account its social, political and economic policies. The Scottish law for instance allows any matter that may be the subject of a dispute to be referred to arbitration apart from matters of public policy and status. In order for a subject matter in a dispute to be arbitrable, it must have some commercial or economic connotation.

In the case of patents, the argument usually put across is that since patents<sup>581</sup> and trademarks have the capability of affecting third parties who are usually not parties to the arbitration proceedings, the arbitral tribunal's authority is likely to be limited to the determination of the relationship between the institution that issues the patent and the patent holder. It cannot extend to declaring a patent invalid. The award that the arbitral tribunal would make in such circumstances would have no effect on the third parties. Such a declaration of invalidity would fall outside the jurisdiction of the arbitral tribunal, as it would be affecting the rights of a public authority that is not a party to the arbitral proceedings. Courts of each country will determine arbitrability in accordance with their own rules of law and their own interpretation of international public policy.

Employment or labour matters are generally not arbitrable in most countries because of the fact that they deal with the rights of an individual and it is a generally accepted position that the judicial process is more protective of an individual's statutory rights than an arbitral process. Disputes relating to banking operations<sup>582</sup> in France are not arbitrable as they are considered as 'police laws' and matters of public policy. Therefore, the application of French banking laws by authorized institutions is mandatory in nature and cannot be derogated from. Having said this it is important to take into account that it is only those mandatory obligations that would impugn France's international public policy that may have an effect on arbitration clauses in an international contract. This was the holding in the case of *Caterpillar Financial Services Corp. v. SNC Passion*.<sup>583</sup> Therefore

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<sup>581</sup> Berg (2001: 53)

<sup>582</sup> Article 15, French Law 84-46

<sup>583</sup> [2004] All ER (D) 377 (Mar)

although the application of French banking law is a mandatory obligation, its non-arbitrability only relates to the local public policy and not to international public policy.

Limitations on arbitrability sometimes come about as a result of mandatory provisions in the laws of certain countries as well as the political, economic and social situations of a given country. Mandatory provisions as well as international public policy may sometime be pegged as synonymous principles. The other factor that needs to be considered is that whilst the mandatory provisions of a state's law may explicitly provide for arbitration of a certain class of disputes, like commercial contracts for example, the same state's law pertaining to the winding up of companies<sup>584</sup> may provide for the same to be done by way of application to a commercial court. It is from restrictions such as these that the question of arbitrability arises. If a dispute does not fall under the jurisdiction of an arbitral tribunal, the issue of arbitrability will not arise.

Article I(3) of the New York Convention provides for recognition of disputes arising out of legal relationships, whether contractual or not, which are considered as commercial under a state's laws. What this implies is that a matrimonial dispute for example may generally not be considered as arbitrable due to its non-commercial nature and also because it does not fall under the subject of international commercial arbitration to which the Convention applies. Having said so, the situation would be different if the matrimonial dispute involves property and worldwide business interests. A husband and wife with such business interests may resort to international commercial arbitration when dealing with a separation or divorce where their joint property becomes a subject that needs to be resolved. In the United States on the other hand, marital status and capacity are viewed as areas reflecting the public policy of the state concerning family matters and are therefore within the exclusive jurisdiction of the courts of law.<sup>585</sup>

The Model Law was just like The New York Convention, designed specifically to apply to disputes that are capable of settlement by arbitration. That is arbitrations with an

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<sup>584</sup> Hackston v. Hackston, [1956] S.L.T 38

<sup>585</sup> Carbonneau (1986: 1159)

international aspect and not national arbitrations. Article I(1) of the Model Law provides for the scope of application of the Model Law.<sup>586</sup> The perceived need for the Model Law is the formation of a standard and reliable system of international arbitration. Central to this system is a limitation in the extent to which the courts may exercise control over the process of arbitration. One particular aim has been to move away from the use or abuse of the courts as a source of tactical delays. To that end, the Model Law severely limits the power of courts to interfere in arbitrations under the Model Law.<sup>587</sup> Courts have used the Model Law to support broad policies of non-intervention and the preservation of autonomy of the forum selected by the parties.

Objective arbitrability is a means by which an arbitral tribunal or country decides on the scope of issues that can legitimately be the subject of international commercial arbitration. It is part of the job of an arbitral tribunal to ask itself whether the dispute that is before it is arbitrable or not.<sup>588</sup> Each country faced with the question of arbitrability should also be able to determine whether arbitration is an available option in resolving a particular dispute or not. Parties to arbitration agreements should not be allowed to circumvent the rules on arbitrability in jurisdictions in which their transaction has its closest connections. It is the responsibility of an arbitral tribunal to inform the parties if it finds that the dispute is not arbitrable under the laws to which the parties have chosen to subject it. This sweeping statement should not be construed to imply that such an action by the arbitral tribunal implies that the arbitral tribunal is invalidating the governing rules and applicable law that is chosen by the parties. The statement should be read from a positive angle to mean that the arbitral tribunal is taking a decision to prevent its award from being set aside at the place of arbitration whose laws may not recognise the dispute as being arbitrable.

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<sup>586</sup> Article I(1) of the New York Convention

<sup>587</sup> Article 5 of the Model Law

<sup>588</sup> *German Seller v. German Buyer* [1980] V Ybk Comm Arbn 260: "The court refused to enforce the arbitral tribunal's award because the tribunal failed to ask itself whether it had jurisdiction to determine the dispute."

### III THE POWER OF AN ARBITRAL TRIBUNAL TO DETERMINE ITS JURISDICTION

The discussion so far in this chapter has shown how the determination of the arbitrability of a subject matter in dispute lies in the domain of a national court. This section discusses an arbitral tribunal's power to determine the extent of its jurisdiction. Unlike the question of objective arbitrability that is raised before the commencement of the arbitration proceedings and after the award is made, an arbitral tribunal determines its jurisdiction during the course of the arbitration proceedings. The study will show how this power is available to an arbitral tribunal in the first instance when the question is raised in most countries. An arbitral tribunal has a duty to determine whether it is functioning within the scope of its authority or not.<sup>589</sup> It does this by examining its very existence where a doubt is raised.<sup>590</sup> The power of an arbitral tribunal to rule on its own jurisdiction like party autonomy forms the cornerstone of the process of international commercial arbitration in the sense that it establishes the independence and autonomy of the process of international commercial arbitration.

An arbitral tribunal has a duty to act within the confines of its jurisdiction. The fact that the parties wish the arbitral tribunal to establish certain rights and obligations on their behalf does not imply that the arbitral tribunal's jurisdiction is without bounds. There must be limits as to what subject matter the arbitral tribunal is allowed to deal with and what it cannot deal with.<sup>591</sup> In the event of a party perceiving that an arbitral tribunal does not have jurisdiction that party has got the prerogative to immediately raise an objection.<sup>592</sup> The failure by a party to promptly challenge an arbitral tribunal may result in a party's waiver of his rights.<sup>593</sup> In the case of *Rustal Trading Ltd v. Gill & Duffus*

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<sup>589</sup> Tweeddale (2005: 380): "Jurisdictional challenges focus on failures in the arbitral proceedings which result in the arbitral tribunal not having any jurisdiction."

<sup>590</sup> *ibid*

<sup>591</sup> *Glencore v. Agros (CA)* [1999] 2 Lloyd's Rep 410 at pages 416-7

<sup>592</sup> *Margulead Ltd v. Exide Technologies* [2005] 1 Lloyd's Law Reports 324 at page 330: "...In a case where there is knowledge or reasonable means of knowledge of the grounds for objection, the point must be raised at the hearing..."

<sup>593</sup> Buhler (2005: 156)

SA<sup>594</sup> Judge Moore-Bick drew attention to the function of section 73(1) of the English Act<sup>595</sup> in these words:

*‘...the subsection as a whole is designed to ensure that a party who believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises the objection if he wishes to do so, as soon as he is, or ought reasonably to be, aware of it. He is not entitled to allow the proceedings to continue without alerting the tribunal and the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid.’*<sup>596</sup>

Section 31(2) of the English Act shows that the most appropriate time to raise a challenge is as soon as the pleader realizes that an arbitral tribunal has acted beyond its powers.

The English Act requires that a challenge before an arbitral tribunal in relation to its excess of jurisdiction be raised as soon as a party becomes aware of the anomaly.<sup>597</sup> An arbitral tribunal is able to exercise discretion and alter the time within which an objection can be made.<sup>598</sup> An arbitral tribunal may be able to exercise discretion, depending on the circumstances of each case when considering jurisdictional challenges that are raised outside the prescribed period of time.

The tribunal may determine the question of its jurisdiction at this stage of the proceedings in the first instance but not finally by virtue of the principle of *competence-competence*,<sup>599</sup> that literally means jurisdiction concerning jurisdiction.<sup>600</sup> It is aimed at delaying court intervention in the arbitration process until after the arbitral tribunal has made its decision on the challenge.<sup>601</sup> This power of an arbitral tribunal is also often referred to in practice using the German illustration of *Kompetenz/Kompetenz* that may be interpreted as meaning jurisdiction to decide jurisdiction.

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<sup>594</sup> (2000) 1 Lloyd’s Rep. 14

<sup>595</sup> Section 73 of the English Act

<sup>596</sup> *op cit*

<sup>597</sup> Section 31(2) of the English Act

<sup>598</sup> *ibid*, Section 31(3)

<sup>599</sup> Binder (2005: 143 & 145): “... “Competence-Competence” ..describes the principle that an arbitral tribunal may rule on its own jurisdiction, meaning that the tribunal can independently determine its power to resolve a certain dispute without having to apply to a court for authorisation.”

<sup>600</sup> Binder (2000: 110)

<sup>601</sup> Park (2006: 93)



France requires a court to declare itself incapable of dealing with an objection against an arbitral tribunal's jurisdiction once the tribunal starts to deal with the issue.<sup>602</sup>

Switzerland permits an arbitral tribunal to rule on its own jurisdiction through an interlocutory decision.<sup>603</sup> The reference in this part of the discussion to provisions in some countries relating to the power of an arbitral tribunal to rule on its own jurisdiction shows the worldwide acceptance of the doctrine in both Model Law<sup>604</sup> and non-Model Law jurisdictions.<sup>605</sup>

The English Act<sup>606</sup> and the Model Law<sup>607</sup> permits this question to be raised before an arbitral tribunal itself in the first instance whilst the arbitration proceedings are in progress. In this way, an arbitral tribunal is able to investigate its own limits on the powers it has to determine a particular issue in dispute whilst the proceedings are ongoing thus expediting the arbitration proceedings. A decision that an arbitral tribunal makes in relation to a challenge against its jurisdiction will remain final and binding on the parties unless an objection is raised by a party.<sup>608</sup> In order for this power of an arbitral tribunal to be established, the parties to an arbitration agreement must clearly and precisely intend for the tribunal to possess such power.<sup>609</sup>

In the *Rio Algom*<sup>610</sup> case, the court held that an arbitral tribunal had jurisdiction in the first instance to determine its own jurisdiction and the scope of its authority. In the case of *D.G Jewelry Inc. et al. v. Cyberdium Canada Ltd. Et al.*,<sup>611</sup> the court held that the

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<sup>602</sup> Article 1458 of the *Nouveau code de procedure civile* (NCPC)

<sup>603</sup> Articles 186 of the *Loi federale sur le droit international prive* (LDIP)

<sup>604</sup> Footnote No. 92, paragraph 25: "The arbitral tribunal's competence to rule on its own jurisdiction,...is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time..."

<sup>605</sup> Footnote No. 99, page v

<sup>606</sup> Section 30(1) of the English Act

<sup>607</sup> Footnote No. 76, Art. 16(1)

<sup>608</sup> Tweeddale (2005: 684)

<sup>609</sup> Footnote No. 99, page 148: "The existence of an arbitral tribunal's jurisdiction ...decides whether the parties are bound by an arbitral award or not. It is therefore necessary that a provision regulating this distinction has to be sufficiently clear and precise; this can be said of Article 16.... page 145: "Article 16 leaves open the question of which law the arbitral tribunal has to apply in the various issues relating to its jurisdiction."

<sup>610</sup> Footnote No. 534

<sup>611</sup> [2002] Ontario Judgments No. 1465 (Lexis)

dispute was within the jurisdiction of the arbitrator and the court would therefore not interfere. The court went further to state that the only time that it could interfere was if there was evidence that the dispute did not fall within the terms of the arbitration agreement. This is the position that the court took in the case of *Masterfile Corp. v. Graphic Images Ltd.*<sup>612</sup>

The English Act gives power to an arbitral tribunal to make a preliminary award when deciding its own jurisdiction.<sup>613</sup> Article 30(1) states that:

*“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*

- (a) Whether there is a valid arbitration agreement,*
- (b) Whether the tribunal is properly constituted, and*
- (c) What matters have been submitted to arbitration in accordance with the arbitration agreement.”*<sup>614</sup>

The English Act<sup>615</sup> construes an arbitral tribunal’s substantive jurisdiction in the light of Section 30 and the excess of an arbitral tribunal’s jurisdiction is construed as an absence of the provision.

The ICC<sup>616</sup> and the UNCITRAL Rules<sup>617</sup> also make available to a tribunal the power to rule on its own jurisdiction. Under the ICC Rules for instance, an arbitrator who accepts an appointment undertakes to abide by its rules in conducting its functions.<sup>618</sup> It is possible for an arbitrator to be faced with a situation where by whilst the claim that he is faced with is within his jurisdiction, a respondent raises issues in its counterclaim which are beyond his mandate. It is obvious that the arbitrator in such a case should only deal with the issues that he is allowed to deal with under his jurisdiction. It is up to the parties

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<sup>612</sup>[2002] Ontario Judgments No. 2590 (Lexis) – The court found that the issue was unclear and therefore that it was best left to the determination of the arbitrator, in accordance with article 16 of the Model Law.

<sup>613</sup> *Primetrade AG v. Ythan Ltd (The Ythan)* [2006] 1 All ER (Comm) 157 at page 182

<sup>614</sup> Section 30 of the English Act

<sup>615</sup> *ibid*, Section 82(1): “Substantive jurisdiction, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.”

<sup>616</sup> Article 6(2) of the ICC Rules

<sup>617</sup> Article 21(1) of the UNCITRAL Rules

<sup>618</sup> Footnote No. 54

to agree to extend his jurisdiction if they wish that the same arbitrator should deal with the dispute in whole. If an arbitrator disregards the fact that he has got no jurisdiction to decide an issue and still proceeds with it, any of the parties may challenge his jurisdiction.

Rules of arbitration may require certain preconditions to be met before a jurisdictional objection can be filed. The UNCITRAL Rules require that a plea for jurisdiction be raised not later than the filing of the defence, or with respect to a counter-claim, in the reply to the counter-claim.<sup>619</sup> Under the ICC Rules, the reasons for an objection to an arbitral tribunal's jurisdiction should be submitted to the Secretariat within a prescribed period of time.<sup>620</sup> Although the arbitral tribunal may join the issue of the jurisdictional objection to the merits of the disputes and make one ruling in the final award, it is encouraged to treat the question of jurisdiction as a preliminary issue to which a ruling may be made before the final award. The most usual manner to pursue these objections is for a challenging party to raise an objection immediately it becomes aware of the grounds for the objection. Undue delay could lead to abuse of the arbitral process by the party who knows that the award will eventually be against him.

The ICC Rules requires that the question of the validity or existence of an arbitration agreement be raised at an early stage of the arbitration proceedings. For example Article 7 prevents the commencement of arbitration proceedings where it is evident that there is no *prima facie* agreement to arbitrate between the parties. This may happen in circumstances where one party alleges that it is not a party to the contract or to the arbitration clause contained therein as it allegedly did not sign any contract or arbitration agreement and the purported signatory did not have that party's authority to sign on its behalf. That party may go on to state that it can therefore not recognize the authority of the arbitral tribunal.

The ICC Rules empower an arbitral tribunal to draw the Terms of Reference that could include the subject matter which the arbitral tribunal may be dealing with. Given this

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<sup>619</sup> Article 21(3) & (4) of the UNCITRAL Rules

<sup>620</sup> Article 11 of the ICC Rules

scenario, one is led to assume that the arbitral tribunal's jurisdiction may be known at this early stage. Therefore any challenge to the jurisdiction of the arbitral tribunal as enshrined in the Terms of Reference should be raised at the earliest opportunity at least before they are signed by the parties.

Under the Model Law, an arbitral tribunal may apply the law of the seat of arbitration when determining its own jurisdiction. This is because the tribunal's power that is embedded in Article 16(1) is a territorial provision.<sup>621</sup> Only after the arbitral tribunal has ruled on the scope of its authority may a court intervene when requested to do so by a party. In order to promote the finality of the arbitration proceedings, the Model Law does not permit an appeal from a decision that is made by a court under such circumstances.<sup>622</sup>

Parties determine the time-scale within which a respondent is to submit his defence.<sup>623</sup> Even before the submission of the defence however, the respondent is at liberty to raise a challenge if the claim establishes any grounds to that effect. The respondent is able at this early stage in the proceedings to raise an objection if need be as the statement of claim in essence states the issues in contention. Grounds for challenge may in some cases only become pertinent after the award is made.<sup>624</sup> An objection to the arbitral tribunal's jurisdiction that is raised later in the proceedings may be based on other grounds which may not have been known to the respondent at that stage in the arbitration proceedings.<sup>625</sup> The tribunal may in dealing with an objection against its jurisdiction that is raised in the course of the arbitration proceedings be governed by the *lex arbitri*.

An arbitral tribunal has got the option of dealing with a challenge immediately it is raised as a preliminary issue or, it may deal with it with the main case and include its decision on the question as to its jurisdiction in its award on the merits. Under the Model Law, the time within which to make such an application in court is of the essence. A party wishing

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<sup>621</sup> Article 1(2) of the Model Law

<sup>622</sup> Footnote No. 506

<sup>623</sup> *op cit*, Article 23

<sup>624</sup> *ibid*, Article 34(2)(a)(iii)

<sup>625</sup> *ibid*, Article 16(2)

to challenge a party in court ought to do so within thirty days from receiving its decision, and the ruling of the court on the matter is not subject to appeal.<sup>626</sup>

The Model Law further permits a double action at this stage of the proceedings and this enables the arbitral tribunal to get on with its work with minimum delay. The arbitral tribunal is able to continue with the arbitration proceedings whilst the application against the arbitral tribunal proceeds in court. The fact that the Model Law specifies the time frame within which to challenge the decision of the arbitral tribunal promotes finality in the arbitration process by restricting the court intervention. A party that fails to abide by the prescribed time factor may be considered as having waived his rights to challenge the arbitral tribunal's decision.<sup>627</sup>

In order for Article 16(1) of the Model Law to be operative, there has to be a valid arbitration agreement in place to hold the parties to their bargain, just like Article 8.<sup>628</sup> Article 8 may further send parties to arbitration on condition that they have a valid arbitration agreement.<sup>629</sup> If a court before which an application is brought under Article 8(1) establishes the following facts being:

- (1) that there is in existence a valid arbitration agreement between the parties; and
- (2) that there is a dispute between the parties which falls within the scope of the arbitration agreement;

it may refer the parties to arbitration. In such a case, Article 16(1) becomes applicable and therefore permits the arbitral tribunal to determine a jurisdictional objection. A court may not be able to refer the parties to arbitration under Article 8 if the court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed.”

<sup>626</sup> Footnote No. 506

<sup>627</sup> Article 4 of the Model Law: “A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”

<sup>628</sup> *ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH* [1994] 135 D.L.R. (4<sup>th</sup>) 130; CLOUT: “the court held that Article 8 is restricted to parties...”

<sup>629</sup> Alvarez (2003: 55)



The doctrine of separability continues to give power to an arbitral tribunal to hear matters pertaining to the alleged nullity of the main contract.

A jurisdictional challenge is essential in curing the excess of jurisdiction or lack of jurisdiction of an arbitral tribunal. The lack of jurisdiction or the excess of jurisdiction amounts to a violation of jurisdiction that an arbitral tribunal has under an arbitration agreement. It is this violation that a party may wish to halt when making an application for a jurisdictional challenge against an arbitral tribunal. An arbitral tribunal's exercise of power outside its jurisdiction may amount to a ground for a jurisdictional challenge if not acquiesced. It is common for a respondent to challenge the jurisdiction of an arbitral tribunal although it is not unusual for a claimant to raise the objection. For instance, in the *Primetrade*<sup>630</sup> case, the claimant applied to challenge the jurisdiction of the arbitral tribunal.

An arbitral tribunal may be construed as lacking jurisdiction if it functions in the absence of a valid arbitration agreement. An arbitral tribunal may be acting outside its jurisdiction if it purports to establish the rights and obligations of a non-party to the arbitration agreement; or if it deals with a dispute that the parties have not agreed should be dealt with by the tribunal. A tribunal that fails to abide by the prescribed time limits including the time within which to make an award risks being challenged for lack of jurisdiction.

An arbitral tribunal that functions outside the limits of its jurisdiction may invite an objection from a party aimed at rectifying the position.<sup>631</sup> An arbitral tribunal owes the parties a responsibility to be certain of the limits of its mission. It cannot deliberately ignore its mandate in pursuance of the interests of one party.<sup>632</sup> Such exercise of its duties would be tantamount to acting in bad faith.<sup>633</sup> There are cases where the arbitrator

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<sup>630</sup> Footnote No. 613

<sup>631</sup> Tweeddale (2005: 376)

<sup>632</sup> ICC Case No. 1776

<sup>633</sup> Footnote No. 132

has no intentions of ignoring his mandate but is forcefully made to do so by the appointing party. A case in point is the *Himpurna*<sup>634</sup> case.

Section 31 of the English Act of<sup>635</sup> provides the procedure for challenging the jurisdiction of an arbitral tribunal. A jurisdictional challenge could be made even before a statement of claim is filed. This is the most appropriate stage at which the objection to the arbitral tribunal's jurisdiction may be made and if the challenge is successful, it may stop the process before it even begins. This is fair to all the parties as time and money are saved. The decision that an arbitral tribunal makes in relation to a dispute between the parties is binding on them unless one of them raises a successful challenge against the tribunal's ruling on its jurisdiction.<sup>636</sup> In dealing with an objection to its jurisdiction, an arbitral tribunal may choose to make "*an award as to jurisdiction, or deal with the objection in its award on the merits.*"<sup>637</sup> The procedure to adopt is the prerogative of the tribunal.<sup>638</sup> In the case of *World Trade Corporation v. C. Czarnikow Sugar Ltd*,<sup>639</sup> the court stated that the policy that underlies the English Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court.

Rix J identified some options available under the English Act to a party raising a challenge against an arbitral tribunal's jurisdiction in the case of *Azov Shipping Co. v. Baltic Shipping Co.*<sup>640</sup> The options were also upheld in the *Primetrade*<sup>641</sup> case. This case

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<sup>634</sup> Footnotes 239, 336 & 489

<sup>635</sup> Section 31 of the English Act: "(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings... (2) Any objection during the course of the arbitral proceedings... must be made as soon as possible after the matter ...is raised. (3) The arbitral tribunal may admit an objection later than the time specified ...if it considers the delay justified. (4) Where ... the tribunal has power to rule on its own jurisdiction, it may- (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. .. (5) The tribunal may ...if the parties so agree, stay proceedings whilst an application is made to the court under section 32 ..."

<sup>636</sup> Footnote No. 631, page 684

<sup>637</sup> Section 30(4) of the English Act

<sup>638</sup> *ibid*

<sup>639</sup> [2005] 1 Lloyd's Law Reports 422 at page 431 paragraph 49

<sup>640</sup> [1999] 1 All ER 476 at pages 477-478: "Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see s. 30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his own competence (see s. 67)...Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under s.32..The third option

is an example of an arbitral tribunal's decision on its jurisdiction that was overturned by the court. The arbitral tribunal decided when challenged that it had jurisdiction, but the court decided that the arbitral tribunal did not have jurisdiction to consider the owner's claims against Primetrade. In the *Weissfisch*<sup>642</sup> case on the other hand, the court dismissed an application for an injunction to restrain the arbitrator from acting as such for the reason that the arbitrator was obliged to rule on his own jurisdiction pursuant to the principle of *Kompetenz-Kompetenz* which principle was recognized under the Swiss law as the seat of the arbitration.

If for any reason there is an issue that the parties have not touched on but which the arbitral tribunal believes from experience that it would assist the parties in the settlement of their dispute, it is within its jurisdiction to bring out fresh material provided that it gives the parties a chance to comment. This was the position taken by the court in the *Zermalt Holdings S.A.*<sup>643</sup> case.

In conclusion therefore it may be seen that an arbitral tribunal's power to rule on its own jurisdiction is different from its powers discussed in chapters two and three of this Thesis in the sense that whilst those powers are exercised in order to resolve the dispute between the parties, this power is a test of its jurisdiction. It questions whether the tribunal is on the right track or not. It may therefore be described as an exceptional power in the sense that it helps define the extent of its powers and therefore becomes its own judge when queried. This power is important as it enables the arbitration proceedings to progress as scheduled in the sense that an arbitral tribunal is able to determine its own jurisdiction whilst continuing with the arbitration proceedings. Further, it promotes the independence of the process of international commercial arbitration as questions pertaining to its jurisdiction are answered in-house. By raising a jurisdictional challenge before the

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of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under s.72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under s.67 on the ground that there was no substantive jurisdiction."

<sup>641</sup> Footnote No. 613, page 182

<sup>642</sup> Footnote No. 101

<sup>643</sup> Footnote No. 243

arbitral tribunal a party is able to obtain immediate remedy and in the process save costs and time.

## CONCLUSION

The discussion in this chapter has made reference to a number of countries and legal instruments other than those under discussion. The reason for this is to illustrate the diversity of the question of arbitrability. The fact that the question of arbitrability may also be subjected to the standards that are not territorial requires a wider analysis of the bench marks that some countries may set in determining arbitrability. There are some matters that each State would prefer were resolved through the court process and not through the process of arbitration. The issues arbitrable in one country may not be so in another country. Public policy considerations, security issues and those that touch on the sovereignty of a country may not be permitted to be resolved using a private method of dispute resolution. These are matters that are left in the jurisdiction of the courts for fear that an arbitral tribunal may get it wrong<sup>644</sup> and thereby affect a country's public interests. Whilst some countries may bar some matters from being subjected to the process of international commercial arbitration due to their sensitive nature, other countries tend to adopt a relaxed approach to their public policy considerations and include such matters as securities regulations<sup>645</sup> and competition law<sup>646</sup> among their lists of arbitrable disputes.

Objective arbitrability acts as a controlling feature of issues that may be subjected to the process of international commercial arbitration. When this question is raised before the commencement of the arbitration proceedings or at the end of the arbitration proceedings, it falls within the jurisdiction of the court, as the arbitral tribunal is not in control of the arbitration at this time. However, whenever a question that touches on the jurisdiction of an arbitral tribunal is raised during the course of the arbitration proceedings, the tribunal

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<sup>644</sup> Park (2006: 88)

<sup>645</sup> *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 [1989]

<sup>646</sup> Footnote No. 65

deals with it in the first instance. In this way, the arbitral tribunal is able to check and determine its own jurisdiction.

There is therefore a need for a clear distinction between matters that may be dealt with using the process of international commercial arbitration and those that must be resolved using the judicial system. Having said this however, and as will be seen in Part Two of this Thesis, the judicial system tends to intertwine with the arbitration process in an exceptional and inevitable manner. It is exceptional in that it is done without interfering in the work of an arbitral tribunal. It is also inevitable in the sense that it is made available in instances when an arbitral tribunal lacks power, is challenged or when the interpretation, maintenance or enforcement of the parties' agreement is required. As things currently stand, the process of international commercial arbitration still needs a certain level of court intervention if it is to succeed. The court stated in the *Coppee Lavalin*<sup>647</sup> case that:

*"There is tension as on the one hand...the concept of arbitration leans against the involvement of the mechanisms of the state through the medium of a municipal court. On the other side there is the plain fact, ... that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering..."*<sup>648</sup>

The support offered by the court is found at every stage of the arbitration process. It becomes more evident when the arbitral tribunal is not in control of the arbitration process. This is so at the beginning of the arbitration process and at the end when the recognition and enforcement of the arbitration agreement and the arbitral award respectively are required. In support of the process of arbitration courts require that parties that choose arbitration as a means of settling their dispute proceed that way.<sup>649</sup>

The Model Law has been compared to the New York Convention in terms of its dependency on courts for its interpretation and application.<sup>650</sup> It is the intention of Part

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<sup>647</sup> Footnote No. 404, at page 53

<sup>648</sup> *ibid*

<sup>649</sup> Article II(1) of the New York Convention

<sup>650</sup> Born (2001: 30): "The Model Law represents a significant further step, beyond the New York Convention, towards the development of a predictable international legal framework for commercial arbitration. Like the New York Convention, the Model Law's efficacy is ultimately dependent upon its interpretation and application by national courts. But the law goes beyond the Convention by prescribing in significantly greater detail the legal framework for international arbitration, by clarifying points of



two of this Thesis to discuss the extent to which the process of international commercial arbitration requires support from the judicial system.

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ambiguity or disagreement under the Convention, and by establishing directly applicable national legislation.....”

## PART TWO

### COURT INTERVENTION IN THE ARBITRATION PROCESS AND AFTER THE MAKING OF AN AWARD

#### CHAPTER FIVE

##### AN ANALYSIS OF THE COURT'S INTERVENTION IN THE ARBITRATION PROCESS BEFORE THE APPOINTMENT OF THE ARBITRAL TRIBUNAL AND DURING THE COURSE OF THE ARBITRATION PROCEEDINGS

###### Introduction

Part two of this study is composed of two chapters that discuss court intervention in two different aspects. These are, the supportive and supervisory role of the courts in the arbitration process, and after the award is made, respectively. This chapter deals with the extent to which a court is permitted to intervene in the arbitration process. Chapter six looks at the supervisory role<sup>651</sup> of the court and the extent to which it may react to an arbitral award. The last chapter of part one of this Thesis has shown how each country's legal system that supports the process of international commercial arbitration provides distinct benchmarks on matters that may be subjected to the process of arbitration within its borders. It also showed how an arbitral tribunal is also permitted to investigate the extent of its jurisdiction. The delimitation that is done by a country describing where the process of arbitration ends and where the court process begins provides essential guidance to the process of arbitration. This chapter shows how courts ensure that the set boundaries are maintained and enforced.

The aim of this chapter is to show how a court is able to assist the process of arbitration before an arbitral tribunal takes charge of the arbitration and during the course of the arbitration proceedings without usurping or interfering in the work of an arbitral tribunal.

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<sup>651</sup> Footnote No. 639, page 425: "The Court does not have a general supervisory jurisdiction over arbitrations."

The study takes cognizance of the fact that the parties appoint an arbitral tribunal to deal with the issues in dispute between them.<sup>652</sup> Consequently, as will be seen in this part of the study, the court intervention that arises relates only to the attacks on an arbitral tribunal's jurisdiction; its conduct of the arbitration; questions of law and; the need for the enforcement of the award. The study describes the instances when court assistance in the arbitration process may be inevitable. This chapter will analyze judicial intervention from the perspective of what Article 5 of the Model Law and Section 1(c) of the English Act permit. The study will show that court intervention permitted by Article 5 of the Model Law unlike that which is permitted by Section 1(c) of the English Act, tends to be restrictive in nature. Under both instruments under study however, intervention is limited to specific instances. The chapter highlights the ancillary role of courts to the process of international commercial arbitration.<sup>653</sup> The role of the court<sup>654</sup> in this study is to intervene in the arbitration process for purposes of providing assistance to the extent necessary.

The first section will essentially look at the basis of court intervention in the arbitration process that is permitted by the Model Law as well as the English Act. It will further look at how Article 5 has been adopted in some Model Law countries. The second section will deal with the instances of court intervention in international commercial arbitration before the appointment of the arbitral tribunal. This section will discuss the extent of court intervention at this stage of the arbitration process and further show whether the intervention is sufficient.<sup>655</sup> The third section will deal with the levels of court intervention during the arbitration process. The discussion will highlight the effectiveness of court intervention at this stage of the arbitration proceedings and its effect on the arbitration process, and on the parties' autonomy as well as on the arbitral

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<sup>652</sup> Footnote No. 19, page 96: "... Parties who submit their disputes to arbitration bind themselves by agreement, to honour the arbitrators' award on the facts..."

<sup>653</sup> *Glidepath BV & others v. Thompson and others* [2005] 2 Lloyd's Law Reports 549 at page 551: "...the intervention of the court in relation to arbitration is a judicial facility ancillary to the arbitral process..."

<sup>654</sup> Park (2006: 11): "... court scrutiny exists to promote the integrity of arbitration by ensuring that arbitrators follow a modicum of procedural fairness and remain within the limits of their mission."

<sup>655</sup> Footnote No. 259, paragraphs 16-17: One of the purposes of the Model Law was "the liberalisation of international commercial arbitration by limiting the role of municipal courts, and by giving effect to the doctrine of 'autonomy of the will,' ..."

tribunal. The fourth section will discuss some of the areas that are not regulated by the Model Law such as interest and costs.

## I THE BASIS OF COURT INTERVENTION UNDER THE MODEL LAW AND THE ENGLISH ACT

Court intervention under the Model Law and the English Act, stem from Article 5<sup>656</sup> and Section 1(c) respectively. These provisions permit courts to intervene in the process of arbitration. Article 5 of the Model Law states that:

*“In matters governed by this Law, no court shall intervene except where so provided in this Law.”*<sup>657</sup>

Section 1 (c) of the English Act is framed in similar terms as Article 5 of the Model Law as follows:

*“The provisions of this Part are founded on the following principles, and shall be construed accordingly- (c) in matters governed by this Part the court should not intervene except as provided by this Part.”*<sup>658</sup>

Court intervention that is permitted by Article 5 of the Model Law<sup>659</sup> that is the subject of discussion in this chapter is established by Articles 8, 9, 11(3), (4) & (5), 13(3), 14(1), 16(3), 17 novies, 17 decies, 17 undecies and 27.<sup>660</sup> The English Act also permits court intervention under the following provisions amongst others: Sections 9, 10, 11, 12, 13, 17(3) & (4), 18(2), (4) & (5), 19, 21(5) & (6), 24, 25, 28, 31(5), 32, 40(2)(b), 42, 43, 44, 45, 50, 56 and, 63(4) & (5). Almost half of the permitted court intervention under the English Act is mandatory<sup>661</sup> and does not, like the court intervention under the Model Law, leave the parties with any choice on how to deal with a matter that falls under a said provision. The whole thrust of these provisions however, is to ensure that courts respect

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<sup>656</sup>Footnote No. 92, paragraph 16: “...Article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it...”

<sup>657</sup> Article 5 of the Model Law

<sup>658</sup> Section 1 (c) of the English Act

<sup>659</sup> Footnote No. 652, paragraph 63

<sup>660</sup> Article 6 of the Model Law

<sup>661</sup> Schedule 1 of the English Act

the arbitration process and only intervene for purposes of ensuring that the arbitration process remains on course.<sup>662</sup> The need for court intervention was summed up in the *Coppee Lavalin*<sup>663</sup> case, where the court stated *inter alia* that:

*“Harmonisation recognises that participation by the court, however unwelcome in theory, is in certain situations inevitable,.....”*<sup>664</sup>

Whilst Article 5 of the Model Law is restrictive (“*no court shall intervene*”), Section 1(c) of the English Act (“*the court should not intervene*”) is aimed at minimizing court intervention as much as may be reasonably possible.<sup>665</sup> In both instruments, recourse to court tends to be subjective in the sense that it may only be accessible at the instance of a party or a tribunal and only in cases where such intervention is permitted. The proviso of ‘except where provided’ sets the maximum limits of court intervention that are available in both instruments under study. The English Act unlike the Model Law makes court intervention in some instances mandatory.<sup>666</sup> Both instruments however only permit court intervention in the arbitration process essentially for purposes of supporting the arbitration process and not hijacking or displacing it.<sup>667</sup> In this way the intervention is available, but at a controlled level.<sup>668</sup>

The Model Law uses time limits as a tool to prevent court intervention in some instances.<sup>669</sup> These limits tend to have closed ends, thus ensuring that the arbitration proceedings remain on course. The downside of having strict time limits when seeking recourse to court is in the event of unforeseen circumstances that may prevent a party from meeting the set deadlines. The English Act<sup>670</sup> somewhat takes unforeseen circumstances into consideration through its lax approach to time within which a party may seek a court remedy. For instance, in cases where the parties set a time limit in their

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<sup>662</sup> Redfern (2004: 329): “... the Model Law cannot exclude,... the participation of ... the ‘competent court’ in carrying out ‘certain functions of arbitration assistance and supervision’.”

<sup>663</sup> Footnote No. 404, page 52

<sup>664</sup> *ibid*

<sup>665</sup> Mustill (2001: 28): “... The court is not absolutely barred from intervening in situations ‘governed by’ the Act. Instead of ‘shall not intervene,’ as in Article 5, there is found ‘should not intervene.’...”

<sup>666</sup> Schedule I of the English Act

<sup>667</sup> Footnote No. 18, paragraph 22

<sup>668</sup> *Sukuman Ltd v. Commonwealth Secretariat* [2006] 1 All ER (Comm) 621, at page 628

<sup>669</sup> Article 8, 11(3)(a) & 16(3) of the Model Law

<sup>670</sup> Sections 12(3), 50(3), and 79(3) of the English Act



arbitration agreement within which the arbitration proceedings are to be commenced, the English Act makes available a mandatory provision to extend the said time limit if requested to do so by a party with cogent reasons.<sup>671</sup>

In the *Lesotho Highlands*<sup>672</sup> case, the court stated that the major purpose of the English Act was to drastically reduce the extent of court intervention in the process of arbitration.<sup>673</sup> It may be argued that the fact that a party is able to seek an extension of the time limits provided in the arbitration agreement, under the English Act,<sup>674</sup> works to the detriment of party autonomy as the court is able to overrule the parties in this regard. Such type of court intervention though helpful to a party in unforeseen circumstances, may be open to abuse by a party wishing to delay the arbitration proceedings whose chances of success in the case seem slim. Article 5 of the Model Law on the other hand restricts party autonomy in a positive manner through set time limits, and thus prevents a delay in the arbitration proceedings. This enables the arbitral tribunal to get on with its task of resolving the disputes between the parties.<sup>675</sup>

Parties that choose international commercial arbitration as a form of settling their disputes are inclined to feel more comfortable in an atmosphere that has a defined system of court recourse that is expressly restricted to the barest minimum. The intervention provided by Article 5 of the Model Law is essentially positive in that it is available to the parties and the tribunal and may be accessed when required. The fact that the English Act makes court intervention in some instances mandatory may be interpreted as being restrictive to party autonomy.<sup>676</sup> Whereas under the Model Law the parties may access court intervention if they wish to, the English Act obliges such intervention where the Act provides for it as a mandatory provision.<sup>677</sup>

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<sup>671</sup> *ibid*, Section 12

<sup>672</sup> Footnote No. 68, page 278

<sup>673</sup> *ibid* "... courts nowadays generally only intervene in order to support rather than displace the arbitral process. ..."

<sup>674</sup> Section 79(1) of the English Act: "Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings..."

<sup>675</sup> Binder (2005: 54): "Article 5 can be seen as a provision useful in helping to secure the Model Law's freedom from disruptive court interference."

<sup>676</sup> Section 12(1) of the English Act

<sup>677</sup> Footnote No. 557

### 1.1 The Adoption of Article 5 of the Model Law in Model Law Countries

The positive impact of the Model Law on the process of arbitration has seen the number of countries adopting the Model Law rise tremendously. In twenty-two years since its inception, it has seen close to fifty countries adopting it with Hong Kong having been one of the first common law countries to adopt the Model Law in 1989. This part of the study is devoted to analysing the stand that some Model Law countries have taken on court recourse. By adopting Article 5, Model Law countries have ensured that they uphold the original objectives of the Model Law<sup>678</sup> by promoting party autonomy<sup>679</sup> and ensuring that court<sup>680</sup> intervention is kept to the barest minimum. The discussion will show that the level of court intervention herein is dependent on the policies that each government holds in relation to international commercial arbitration as a form of dispute settlement.

The Model Law has provided a solid foundation in the field of international commercial arbitration, as there is now a defined legal framework that forms the foundation for the uniform character of international commercial arbitration. This uniformity characteristic of the Model Law is what attracts countries that have not adopted the Model Law to consider doing so. South Africa is one country that is currently contemplating adopting the Model Law and in so doing will join countries like Zimbabwe<sup>681</sup> and Zambia that have already adopted the Model Law in that region.

Article 5 has in some countries been adopted in whole whilst in other countries it has been modified somewhat.<sup>682</sup> Countries that have adopted Article 5 verbatim include Scotland,<sup>683</sup> Thailand<sup>684</sup> and Germany.<sup>685</sup> Other countries have adopted Article 5 but either re-phrased it or re-emphasized the type of court intervention that is permitted

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<sup>678</sup> Sanders (2005: 443): "The Model Law was conceived for International Commercial Arbitration

<sup>679</sup> Davidson (1991: 12)

<sup>680</sup> Footnote No. 196, paragraph 70: The Working Group feared that Article 5 would have an adverse effect on the positive and helpful attitude of the court.

<sup>681</sup> Arbitration Act of 1996 (No. 6)

<sup>682</sup> Footnote No. 203, Article 5, paragraph 4.

<sup>683</sup> Footnote No. 7, Article 5

<sup>684</sup> Thailand Arbitration Act of 2002

<sup>685</sup> The New German Arbitration Act of 1998

within their borders. The New Austrian Arbitration Law<sup>686</sup> chose to re-phrase Article 5 as follows:

*“The Court may only become active in matters governed by this chapter if it is so provided in this chapter.”*<sup>687</sup>

The Californian Arbitration Act that is similar to the arbitration law in Texas and Oregon adopted the Model Law and extended<sup>688</sup> the law that is applicable to Article 5 to include the ‘applicable federal law’. The said Article 5 of the Californian Arbitration Act reads as follows:

*“In matters governed by this title, no court shall intervene except where so provided in this title, or applicable federal law.”*<sup>689</sup>

Article 5 as adopted in British Columbia places stringent restrictions on court intervention in the arbitration process under its Section 5(b). It completely closes the door and bolts it against wider court intervention in an arbitral tribunal’s orders, rulings or arbitral award.<sup>690</sup> Section 27(2) of the British Columbia Act opens the doors sealed by Section 5(b) by giving power to the court to consolidate related arbitration proceedings and to add third parties on its own terms. This provision may be portrayed as limiting the parties’ autonomy as the parties may not always have much say in the inclusion of other parties in their arbitration and in the choice of an arbitral tribunal to resolve the matters in the consolidated arbitration as the ultimate decision lies with the court.<sup>691</sup> Ireland’s adoption of the Model Law supports the limitations on the scope of court intervention in the arbitration process as permitted by the Model Law. Ireland alludes to the principle that “a jurisdiction is not conducive to arbitration if it permits repeated forays to the courts basically to appeal issues of law that arise during the course of the arbitration.”<sup>692</sup>

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<sup>686</sup> Footnote No. 9

<sup>687</sup> *ibid*, Article 578

<sup>688</sup> Born (2001: 40)

<sup>689</sup> Section 1297.51 of the Californian Arbitration Act

<sup>690</sup> International Commercial Arbitration (RSBC 1996) Chapter 233: “5(b) no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed ... or otherwise except to the extent provided in this Act.”

<sup>691</sup> *ibid.*, Section 27(2)

<sup>692</sup> <http://www.dublinarbitration.com/aia/aia07.htm>

Germany has adopted the Model Law almost to the letter with minor differences. Those relevant to this discussion include the court's power to constitute the tribunal if a party is disadvantaged by the nomination process contained in the arbitration agreement and the parties' right to have arbitral interim relief enforced by the courts.<sup>693</sup> The New German Act permits court intervention for purposes of determining the admissibility of an arbitration agreement prior to the constitution of an arbitral tribunal.<sup>694</sup> The LR(MP)(S) Act sums up the functions of the court as made up of "*arbitration assistance, supervision and enforcement.*"<sup>695</sup>

#### I.1(i) The Impact of the Restrictive Nature of Article 5 of the Model Law on Arbitration

This part of the study is aimed at showing how the restrictive nature of Article 5 of the Model Law impacts on arbitration. It will identify some of the areas that are not regulated by Article 5. It will further show that court intervention as enshrined in Article 5 may be interpreted to be restrictive in the sense that it does not provide any court recourse in situations where the parties wish to challenge issues such as 'interest, costs, fees and the liabilities of arbitrators.'<sup>696</sup> Pieter Sanders has shown support of this position in the following terms:

*"The Model Law does not deal with fees and costs in arbitration but the issue, whether the Model Law should deal with court control on utterly unreasonable fees of the arbitral tribunal, has been left open. In my opinion, fees and costs as such is a topic for arbitration rules..."*<sup>697</sup>

Scotland<sup>698</sup> being one of the countries that has adopted Article 5 verbatim also does not provide for court intervention in issues relating to interest, cost, fees and the liability of arbitrators. These issues are instead addressed by the Scottish Common Law system and by precedents. Parties that choose Scotland as their seat of arbitration and wish to seek

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<sup>693</sup> Berger (2000: 16)

<sup>694</sup> Footnote No. 685, Section 1032(2)

<sup>695</sup> Footnote No. 7, Article 6

<sup>696</sup> Mustill (2001: 29)

<sup>697</sup> Sanders (2005: 473)

<sup>698</sup> Footnote No. 7, Article 66(2)

court recourse in these areas may apart from choosing to have their arbitration proceedings governed by a set of arbitration rules, in addition also adopt the Scottish Arbitration Code that provides for court intervention in issues pertaining to fees, expenses or costs.<sup>699</sup>

Although the Model Law does not regulate the above stated issues, a party may still seek a court remedy under Article 34(2)(iv) of the Model Law. Article 34(2)(iv) permits court recourse against an arbitral award where a party has ground to prove that “the arbitral procedure was not in accordance with the agreement of the parties.”<sup>700</sup> The fact that a party has an issue with the costs, fees, interest, or believes that an arbitral tribunal is liable may amount to sufficient ground to seek court protection under Article 34(2)(iv). The only problem is that such recourse may only be accessed after an award is made. The Model Law does not therefore provide any court recourse in this area during the course of the arbitration proceedings. This therefore shows that it was never the intention of the Model Law to provide court intervention during the course of the arbitration proceedings to challenge the fees, costs, interest or the liability of the arbitrators.

The rules of arbitration such as those of the ICC have a scale that may be used to calculate the administrative costs of the arbitration, and the arbitral tribunal’s fees and expenses.<sup>701</sup> The Court fixes the costs of the arbitration and the arbitral tribunal determines how the costs are to be borne.<sup>702</sup> The ICC Rules further exempt an arbitral tribunal for its acts or omissions relating to the arbitration.<sup>703</sup> The UNCITRAL Rules gives power to an arbitral tribunal to calculate the costs of the arbitration.<sup>704</sup> The UNCITRAL Rules like the ICC Rules also exempt an arbitral tribunal from liability for acts or omissions connected to the arbitration “*save where the act or omission is shown*

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<sup>699</sup> Articles 8.3 and 24 of The Scottish Arbitration Code

<sup>700</sup> Article 34(2)(iv) of the Model Law

<sup>701</sup> Article 31(1) as read together with Article 4(1) of Appendix III of the ICC Rules

<sup>702</sup> Article 2(6) of Appendix III of the ICC Rules

<sup>703</sup> Article 34 of the ICC Rules

<sup>704</sup> Footnote No. 411



*by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.*"<sup>705</sup>

Another issue that is worth mentioning here is that Article 16 of the Model Law does not make an express reference to the question of arbitrability<sup>706</sup> in the same terms as Article 34. However the competence of an arbitral tribunal to decide whether it may settle an issue by arbitration may include a determination of objective arbitrability. Objective arbitrability may therefore be raised under Article 16 as well as under Article 34 of the Model Law. An inference may therefore be drawn that it was the intention of the draftsmen of the Model Law to permit court intervention based on the question of arbitrability during the course of the arbitration proceedings and after the arbitral award was made.

It is clear that Article 5 does not regulate arbitrability, fees, costs, issues relating to interest and the liability of arbitrators. The English Act however has a mandatory provision that regulates court intervention in issues relating to the arbitral tribunal's fees and expenses.<sup>707</sup> The discussion so far in this chapter shows that the English Act is more daring in permitting court intervention as compared to the Model Law. The Model Law tends to be more restrictive thus promoting party autonomy.

## II COURT INTERVENTION BEFORE THE APPOINTMENT OF THE ARBITRAL TRIBUNAL

This section discusses the court intervention that is permitted in the arbitration process before the appointment of the arbitral tribunal. Court intervention at this stage of the arbitration is necessary as it protects each party's interest in the dispute and ensures that the dispute is resolved in accordance with the parties' agreed method of dispute resolution. Any court intervention at this stage of the proceedings has to be applied for

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<sup>705</sup> Article 31(1) of the UNCITRAL Rules

<sup>706</sup> Tweeddale (2005: 108)

<sup>707</sup> Sections 28 and 56(1) of the English Act

by a party. This study discusses three instances when parties may seek court intervention before the appointment of an arbitral tribunal, which are:

1. Court intervention for purposes of having the arbitration agreement recognized and enforced.
2. Court intervention in the appointment of an arbitral tribunal
3. Seeking court intervention in order to maintain the status quo or preserve evidence through interim measures of protection.

## II.1 Court Intervention in the Recognition of an Arbitration Agreement

Parties that enter into an arbitration agreement are expected to honour their part of the bargain. The parties' recognition of their arbitration agreement is fundamental to the process of international commercial arbitration as the agreement forms the basis upon which the resolution of their disputes is founded. A party may however for various reasons choose not to give the arbitration agreement any recognition. In such a situation, a party who feels that the other party has failed to meet his part of the bargain may choose to seek court remedy and disregard the arbitration agreement

The Model Law and the English Act have set procedures that a party wishing to challenge court proceedings that he institutes in lieu of the arbitration agreement ought to follow. Article 8 of the Model Law and Section 9 of the English Act are both instructive here. Article 8 of the Model Law states as follows:

*“(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.  
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”<sup>708</sup>*

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<sup>708</sup> Article 8 of the Model Law

This article was designed to also hold parties<sup>709</sup> to their bargain and send them to arbitration on condition that there was a valid arbitration agreement in place.<sup>710</sup> A party that wishes to seek the protection of Article 8(1) must satisfy three prerequisites. Firstly, the party must establish the existence of a valid arbitration agreement. Secondly, the party must prove that a dispute exists between the parties, which dispute falls within the scope of the arbitration agreement. Thirdly, the application before the court for a stay of proceedings must be made within the prescribed time frame. If a party making the application fails to establish these prerequisites before the court, then the court<sup>711</sup> may not be able to grant the application as prayed.

Section 9 provides a mandatory obligation on a court to stay legal proceedings that relate to a claim that is the subject of an arbitration agreement.<sup>712</sup> In order for a court to entertain an application for a stay however, an acknowledgement of receipt of the claim before the court must be filed. Article 8 of the Model Law permits a court to entertain an application for a stay of legal proceedings where one party has already set the wheels in motion for arbitration and the other party commences legal proceedings whilst the arbitration proceedings are already underway. Since Article 8 and Section 9 are non-territorial in nature, a party is able to challenge the commencement of legal proceedings in lieu of arbitration in any court where the legal proceedings will have been instituted. In this way, a party is able to get immediate redress from the court and may therefore have the dispute referred to arbitration. Article 8 is given its non-territorial nature by Article 1(2) of the Model Law which, states that:

*“The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.”*<sup>713</sup>

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<sup>709</sup> Footnote No. 628

<sup>710</sup> Alvarez (2003: 55)

<sup>711</sup> ATM Computer GmbH v. DY 4 Systems Inc. [1995] O.J. No. 1678; CLOUT: Referral to arbitration pursuant to Model Law Article 8 requires commencement of an action in the relevant jurisdiction.

<sup>712</sup> Section 9 of the English Act: “(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter...”

<sup>713</sup> A/CN.9/592, paragraph 45 “...adopted in substance by the Working Group.”

The need for a valid arbitration agreement is fundamental and is the ground upon which an application for a stay of legal proceedings is based. The validity of an arbitration agreement is determined pursuant to the law governing the arbitration agreement. When the validity of the arbitration agreement is established, a court may grant an order for the stay of the legal proceedings. In the case of *Cecrop Co. v. Kinetic Sciences Inc.*,<sup>714</sup> the court held that it was a requirement of Article 8 of the Model Law to grant a stay of court proceedings if its prerequisites were met subject to a finding that the arbitration agreement was null and void, inoperative or incapable of being performed. In the case of *International Resource Management (Canada) Ltd v. Kappa Energy (Yemen) Inc.*,<sup>715</sup> the Court of Appeal granted an unconditional stay of court proceedings and paved the way for the parties to proceed with the arbitration process.

Article II (3) of the New York Convention, unlike the above stated provisions, is territorial in nature.<sup>716</sup> If the parties' chosen seat of arbitration has acceded to the New York Convention, then a party may have the option of requesting the court to send the matter before it to arbitration pursuant to Article II (3).<sup>717</sup> If the other party brings to the attention of the court that there is in fact an arbitration agreement in place, the court may stay the proceedings and send the parties to arbitrate.

A court may only decline to give recognition to the arbitration agreement if the agreement is invalid. In such a case, the dispute may fall under the jurisdiction of the court, as the issues in dispute may not be arbitrable. A distinction may be drawn between a court declaring an arbitration agreement and a contract invalid. Whilst the declaration of a nullity of the arbitration agreement enables the court to litigate the dispute, the nullity of a contract encompassing an arbitration agreement does not nullify the arbitration agreement. In the case of *AMB Generli Holding AG v. SEB Trygg Liv Holding*<sup>718</sup> the court held *inter alia* that the 'arbitral proceedings were not a nullity by

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<sup>714</sup> [2001], 16 B.L.R. (3d) 15 : CLOUT

<sup>715</sup> (2001) 92 Alberta Law Reports (3d)25

<sup>716</sup> Footnote No. 527

<sup>717</sup> Lew (2003: 362)

<sup>718</sup> [2006] 1 Lloyd's Law Report 318 at page 323

*reason of their having been commenced in the name of a company that no longer existed.*<sup>719</sup>

A court may in cases where liability is accepted not grant a stay of proceedings as there may no longer be a dispute between the parties. In the case of *Methanex New Zealand Ltd v. Fontaine Navigation S.A.*<sup>720</sup> the court found among other things that there was no basis to stay the court proceedings pursuant to Article 8(1) of the Model Law, as the defendant never denied liability. The failure to establish the validity of an arbitration agreement gives a court jurisdiction to determine the issues in dispute between the parties and may also dismiss the application for a stay. In the case of *Simmonds Capital Ltd v. Eurocom International Ltd*,<sup>721</sup> the court held that the plaintiff's claims relating to the Trademark Act and Copyright Act did not fall within the scope of the arbitration clause in the license agreement because they were independent of the agreement.<sup>722</sup>

Unlike Article II(3) of the New York Convention, Article 8 of the Model Law and Section 9 of the English Act recognize the time within which a party may bring the information of the existence of the arbitration agreement to the attention of the court to be of the essence. In the case of *Nutrasweet Kelco Co. v. Royal-Sweet International Technologies Ltd. Partnership*<sup>723</sup> the court stated that Royal-Sweet had failed to respect the set time limits for making an application to stay proceedings. Article 8 requires that the step of informing the court of the existence of the arbitration agreement be done "*not later than when submitting his first statement on the substance of the dispute..*" Section 9 on the other hand requires an acknowledgment of receipt of the legal action to be filed before the respondent may apply for a stay of the proceedings.

The New York Convention however, does not provide for any time limit within which to take steps to stay legal proceedings. This is a disparity that needs to be resolved. There is need for the time frames to be resolved in order to prevent parties from sitting on their

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<sup>719</sup> *ibid*

<sup>720</sup> [1998] 142 F.T.R. 81; CLOUT

<sup>721</sup> [1998], 144 F.T.R. 230; 81 C.P.R. (3d) 349

<sup>722</sup> Alvarez (2003: 80)

<sup>723</sup> [1998] B.C.J. No. 557; 49; 49 B.C.L.R. (3d) 115; CLOUT



rights whilst claiming protection from Article II(3). A party may easily take advantage of Article II(3) if he forgets to object within the time frame provided above. Article II(3) of the Convention when read together with Article 8 of the Model Law may not permit a party to ignore the time within which to object to the legal proceedings. In this way it can be stated that these two articles sit side by side. A court that is obliged to refer the parties to arbitration subject to it establishing that the issue that is raised before it is the subject of an arbitration agreement will be the court in the country where the legal proceedings are commenced.<sup>724</sup> The court's obligation is subject to a request for stay of legal proceedings being made by the respondent. Such a court may be at the seat of the arbitration or in the country where the party that does not recognize the arbitration agreement is domiciled.

## II.2 Court Intervention in the Appointment of an Arbitral Tribunal

National courts have an important role to play in the composition of the tribunal, either as a fall back appointing authority or when the mandate of an arbitrator ends prematurely. The former situation that is covered in this section of the study arises when parties fail to agree on the arbitrator or where the prescribed appointment mechanism does not work. The court may be requested by the parties to an arbitration agreement to intervene in the appointment of an arbitral tribunal either before the arbitral tribunal takes control of the arbitration proceedings or during the course of the arbitration proceedings.

The Model Law under Article 11(3) provides for the parties to determine the appointment procedure of its arbitral tribunal. The court's intervention only becomes applicable after the parties fail to agree on a procedure for appointment. In approximately ninety nine out of one hundred times, a party will access Article 11(3) or (4) before the commencement of the arbitration proceedings. The English Act, like the Model Law, also permits a court to appoint an arbitral tribunal when the parties fail to do so.<sup>725</sup> The appointment of an

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<sup>724</sup> *West Tankers Inc. v. Ras Riunione Adriatica Di Sicurta "The Front Comor"* [2005] 2 Lloyd's Law Reports 257 at page 269: "...this provision identifies the duty which rests on the court seised of court proceedings to stay those proceedings and to refer the parties to arbitration..."

<sup>725</sup> Section 18(3)(d) of the English Act: "Those powers are to make the necessary appointment itself."

arbitral tribunal that is made by the court under the Model Law cannot be challenged in a higher court in the form of an appeal.<sup>726</sup> The English Act however permits an appeal, but with leave.<sup>727</sup>

The intervention by the court in the arbitration before the tribunal takes control of the arbitration has to be provided for by the parties. The parties may however in some cases choose to be governed by rules of arbitration that may not provide for a court to appoint a tribunal when the parties fail to do so. For instance, in the case of *Microtec Securi-T Inc. v. Quebec National and International Commercial Arbitration Centre (CACNIQ)*<sup>728</sup> the court refused to intervene in the appointment of the arbitral tribunal when the parties failed to agree, as the CACNIQ arbitration rules had its own appointment procedure which could be used in the event of a lack of agreement by the parties. The CACNIQ arbitration rules in essence excluded court intervention in the appointment process of the arbitrators. It is therefore essential that the parties be held to their contract.<sup>729</sup>

In cases where the arbitration agreement provides for a court to intervene when parties fail to agree on the appointment of an arbitral tribunal, the success of the application is dependent on the grounds that are raised in support of the application. A court may therefore refuse an application if the grounds raised are not cogent. For example, in Case number 557,<sup>730</sup> “the court rejected the claimant’s request to appoint an arbitration tribunal and declared the arbitration proceedings inadmissible. Since the arbitration clause did not specify which of the two chambers of handicraft was chosen, it was impossible to determine the competent tribunal. The court thus declared the arbitration agreement void for uncertainty, irrespective of the fact that neither of the two chambers was actually engaged in arbitration or even willing to appoint an arbitrator.”<sup>731</sup>

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<sup>726</sup> Article 11(2) - (5) of the Model Law: “(2) The parties are free to agree on a procedure of appointing the arbitrator....(3) Failing such agreement,... (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court....shall be subject to no appeal....”

<sup>727</sup> Footnote No. 47

<sup>728</sup> [2003] Quebec Judgements No. 2918 (Lexis)

<sup>729</sup> Davidson (1991: 136)

<sup>730</sup> <http://www.dis-arb.de>

<sup>731</sup> *ibid*

### 11.3 Court Intervention Sought for Purposes of Interim Relief

Court intervention may be sought before an arbitral tribunal takes charge of the arbitration in order to maintain the status quo or during the course of the arbitration proceedings. An order in this respect may be sought by a party from the court to prevent evidence from being tampered with. Article 9 of the Model Law permits a party to request the court to intervene in the arbitration process for purposes of preserving evidence and maintaining the status quo. This is a non-territorial provision that may be made in a court located in the country where the preservation of evidence is required. An application of this nature may be made under the Model Law before an arbitral tribunal is appointed or during the course of the arbitration proceedings. Article 9 states that:

*“It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.”*<sup>732</sup>

The English Act also permits a court to entertain an application for interim relief relating to issues that are the subject of an arbitration agreement when the arbitral tribunal has got no power to act.<sup>733</sup> Court intervention may be accessed before the arbitral tribunal takes charge of the arbitration or during the course of the arbitration proceedings.<sup>734</sup> It may however only be available to a party if the tribunal has got no power to make the order for interim measure of protection.<sup>735</sup>

Under the English Act court intervention before an arbitral tribunal takes control of the arbitration process is not only at the request of the parties, but is also mandatory in some instances. For instance the Act imposes a mandatory obligation on the courts to stay proceedings in a matter that is brought before it that is the subject of arbitration.<sup>736</sup> The fact that these provisions are non-territorial enables a party to obtain immediate relief from a court in the country where the evidence he wishes to preserve is and not necessarily at the seat of the arbitration. These are useful provisions that give protection

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<sup>732</sup> Article 9 of the Model Law

<sup>733</sup> Section 44(5) of the English Act

<sup>734</sup> *ibid*, Section 44(1)-(4)

<sup>735</sup> Footnote No. 87

<sup>736</sup> *op cit*, Section 10(1)

to a party that strongly suspects the other of wanting to dispose of evidence. The usefulness of the provisions is not only evidenced by the non-territorial nature of the provisions, but also because a party may urgently access them through *ex parte* applications. In this way a party is able to obtain immediate interim relief that is easily enforceable in the country where the evidence is located. In the case of *Cetelem SA v. Roust Holdings Limited*,<sup>737</sup> Lord Justice Clarke stated that:

*“The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot... where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process.”*<sup>738</sup>

Courts may not usually involve themselves in matters relating to arbitration proceedings except where provided and only when requested to do so by a party.<sup>739</sup> Such involvement however may not be extended to the substantive issues in a dispute that are dealt with by a tribunal. The assistance that the court offers the process of international commercial arbitration before an arbitral tribunal takes control of the arbitration is progressive as it prevents the tampering of evidence. A court is able with its coercive powers to ensure that the status quo is maintained and interim relief is available to a party. The court therefore assists in holding parties to their bargain before an arbitral tribunal takes charge of the arbitration. But as already stated, the court’s assistance can not extend to resolving the substantive issues in a dispute between the parties as that is the responsibility of the arbitral tribunal.

### III COURT INTERVENTION DURING THE COURSE OF THE ARBITRATION PROCEEDINGS

During the course of the arbitration proceedings, the arbitral tribunal is in charge of the arbitration. The Model Law and the English Act both permit parties to seek recourse from a court in specific circumstances. The instances when recourse to court is available

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<sup>737</sup> [2005] 2 Lloyd’s Law Report 494

<sup>738</sup> *ibid*, page 506

<sup>739</sup> Footnote No. 136

at this stage of the arbitration proceedings, is when a party wishes to attack an arbitral tribunal directly and when seeking an interim measure of protection. This study will discuss the following issues that may lead to court intervention at this stage of the arbitration proceedings. These are:

- Personal and procedural objections against an arbitral tribunal;
- Jurisdictional challenges against an arbitral tribunal;
- Interim Measures of Protection, and;
- Assistance in Taking Evidence.

### III.1 Personal and Procedural Objections Against an Arbitral Tribunal

A party may seek to remove an arbitrator who does not meet the set standards required of an arbitrator in a particular arbitration. Each arbitrator owes the parties a fundamental obligation to make a statement of disclosure that must be given to the parties before the arbitrator can accept an appointment. The disclosure may *inter alia*, include the qualifications that the arbitrator possesses. Having provided the statement of disclosure, any party may object if fresh information leads to a doubt as to an arbitrator's capacity to continue to serve as an arbitrator. The Model Law provides the arbitral tribunal itself as the first port of call under such circumstances. It places a qualification on the extent to which a party that has participated in the appointment of an arbitrator may go in challenging its own arbitrator in court. The said party may only raise grounds that come to his attention after the appointment of the arbitrator is made.<sup>740</sup> The Model Law gives a party the power to seek court protection where any of the permitted grounds are established.<sup>741</sup> However only after an arbitral tribunal has dealt with an objection falling under this heading may a party resort to court action.

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<sup>740</sup> Article 12(2) of the Model Law

<sup>741</sup> *ibid*, Article 13(3): "If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal, while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."



It is therefore necessary that disclosure is done by each arbitrator at the beginning of the arbitration process and as necessary as the case progresses, in order to limit challenges under this head. The Model Law shows that once an arbitrator is appointed, he remains as such until he is removed or he dies.<sup>742</sup> Consequently, the challenged arbitrator still possesses the mandate to deal with the dispute between the parties whilst he is being challenged in court, thus recognizing the continuity of an arbitrator's mandate.<sup>743</sup>

The English Act identifies four grounds that may lead to the removal of an arbitrator by the court under Section 24(1) as follows:

*“(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds-*

- (a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*
- (b) that he does not possess the qualifications required by the arbitration agreement;*
- (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*
- (d) that he has refused or failed-*
  - (i) properly to conduct the proceedings, or*
  - (ii) to use all reasonable despatch in conducting the proceedings or making an award,*

*and that substantial injustice has been or will be caused to the applicant.”<sup>744</sup>*

An arbitral tribunal is therefore duty bound to ensure that he declares to the parties any issues that may lead to any doubts as to his impartiality,<sup>745</sup> his qualifications, his mental and physical capability, or his inability to function. In cases where any of the grounds referred to above are established by a court at the seat of the arbitration, the mandate of the arbitrator terminates immediately.

Under Article 14(1) of the Model Law, a party may request a court at the seat of the arbitration to remove an arbitrator who becomes “*de jure or de facto* unable to perform his functions”. Whilst Article 13(3) of the Model Law permits an arbitral tribunal to

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<sup>742</sup> Section 26(1) of the English Act

<sup>743</sup> *ibid*, Section 24(3)

<sup>744</sup> *ibid*, Section 24(1)

<sup>745</sup> *ibid*

continue with its work as the objection is pending in court, Article 14(1) does not give power to an arbitral tribunal to continue with its work whilst the matter is in court. Article 14(1) covers a situation where a party goes straight to court to seek the termination of an arbitrator's mandate. In such a case where the arbitrator is not given a chance to determine the challenge, it cannot continue with its work until after the outcome of the court case. The way that the arbitral tribunal handles an application under Article 14(1) is the same way that it would react if one of its members was reported to be unwell and consequently failed to attend the arbitration proceedings. In such a case, the arbitration proceedings may not proceed.

The termination of the mandate of an arbitrator may lead to the appointment of a substitute arbitrator.<sup>746</sup> In this case, the parties may wish to use the same method that they used to appoint the other arbitrator whose mandate will have come to an end. Article 11(3)(a) has got a time frame of thirty day within which an arbitrator must be appointed. It is however silent on the repercussions of failing to meet the said dead line. The idea of putting a deadline acts as a safeguard against any delay to the arbitration proceedings.

Unlike the Model Law that is silent on the question of costs of the arbitration and the tribunal's fees and expenses, the English Act may hold the parties "jointly and severally liable"<sup>747</sup> for the non-payment of the tribunal's fees. In instances when the tribunal does not determine the recoverable costs of the arbitration, any party may seek the court's intervention in this matter.<sup>748</sup> The English Act contains a further mandatory provision that gives power to an arbitral tribunal to withhold an award in cases where the parties fail to pay its fees.<sup>749</sup> A party may in such a case seek recourse from a court in such circumstances and the decision of the court may only be appealed against with leave.<sup>750</sup> Unlike the Model Law that does not provide for appeal once court recourse is sought, the

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<sup>746</sup> Article 15 of the Model Law

<sup>747</sup> Section 28(1) of the English Act

<sup>748</sup> *ibid*, Section 63(4) & (5)

<sup>749</sup> *ibid*, Section 56 (1) & (2)

<sup>750</sup> *ibid*, Section 56(7)

English Act permits appeals but with leave. The need for leave is an evidence of the English court's reluctance to intervene in the arbitration process.

The case of *AT & T Corporation and another v. Saudi Cable*<sup>751</sup> is an example of a matter that went up to the House of Lords on appeal. In contrast to the English Act that permits appeals, the Model Law encourages progress of the arbitration proceedings at this stage of the arbitration by prescribing a time frame within which an arbitrator may be appointed and by not permitting any court appeals during the course of the arbitration proceedings. Whilst the English Act tends to provide mandatory provisions for court intervention, the Model Law permits court intervention as a default mechanism where the parties fail to agree on a procedure for challenge.

Whilst a court may not determine a question of fact<sup>752</sup> it may, when requested, intervene for purposes of determining a question of law arising in the course of the arbitration proceedings under the English Act.<sup>753</sup> In the case of *Taylor Woodrow Holdings Ltd and another v. Barnes & Elliot Ltd*,<sup>754</sup> the court held that:

“(1) Once the threshold criteria set out in s 45 were satisfied (namely (a) that the question arose out of arbitral proceedings, (b) that the question of law substantially affected the rights of the parties, and (c) the requirements of s 45(2) were satisfied) the court retained a discretion as to whether or not to consider the matter ....”<sup>755</sup>

### III.2 Jurisdictional Challenges Against an Arbitral Tribunal

By virtue of the principle of *competence-competence*, the arbitral tribunal may have the power to deal with jurisdictional issues arising in the course of the arbitration in the first

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<sup>751</sup> (2000) 2 Lloyd's Rep. 127

<sup>752</sup> Footnote No. 19, page 97: “This catalogue of challenges to arbitrator's findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.”

<sup>753</sup> Section 45(1) of the English Act: “Unless otherwise agreed by the parties, the court may on the application of a party... (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties....”

<sup>754</sup> Footnote No. 17

<sup>755</sup> *ibid*

instance.<sup>756</sup> Both the Model Law<sup>757</sup> and the English Act<sup>758</sup> permit a party to request a court to intervene in a jurisdictional question. The Model Law demands that such intervention be sought within a period of thirty days from the date of the tribunal's ruling. The English Act<sup>759</sup> requires a party that wishes to challenge the decision of an arbitral tribunal on a jurisdictional issue in court to obtain permission to do so from the other party and the arbitral tribunal. Before a court may have power to determine the tribunal's jurisdiction, a party must raise the challenge before the arbitral tribunal itself.<sup>760</sup> If a party decides not to participate in the arbitration proceedings as a result of its challenge to the arbitral tribunal's jurisdiction, it may pursuant to section 72 proceed to make an application in court pertaining to its challenge.<sup>761</sup>

A party may rely on Section 72(1) of the English Act and choose not to participate in the arbitration proceedings if the party objects to the arbitral tribunal's jurisdiction.<sup>762</sup> In such a case, the objecting party may instead request a court to deal with his application for a challenge of an arbitral tribunal's jurisdiction. In the case of *Law Debenture Trust v. Elektrim Finance*<sup>763</sup> Law Debenture Trust chose not to take part in the arbitration proceedings and instead sought to raise the question of jurisdiction under section 72. The court held that an objecting party had a right to bring proceedings under section 72. The option of boycotting the proceedings more often than not works to the detriment of the party objecting, as the arbitrator may still proceed and make a decision based on the evidence before him. The downside of this course of action is that the objecting party may lose an opportunity to present his case before the arbitrator. The only way that a pleader can make this course of action work in his favour would be by seeking a

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<sup>756</sup> (1999) XXIVa Ybk Comm Arbn 80-106 – Final Awards Cases Numbers 6515 & 6516 of 1994

<sup>757</sup> Footnote No. 506

<sup>758</sup> Footnote No. 152

<sup>759</sup> Section 32(2)(a) & (b) of the English Act

<sup>760</sup> Footnote No. 614 & 506

<sup>761</sup> Footnote No. 670

<sup>762</sup> Section 72(1) of the English Act: "A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question- (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief."

<sup>763</sup> [2005] 2 All ER 476

restraining order from the court in order to prevent the arbitrator from continuing with the arbitration proceedings whilst the proceedings are going on.

Section 32<sup>764</sup> of the English Act provides the procedure that a party who goes straight to court with an application for a challenge of an arbitral tribunal's jurisdiction may adopt. An application under this section has to be made promptly with the permission of the tribunal and the agreement of all parties. The decision of the court made pursuant to an application made under Section 32 is a judgment of the court and can only be appealed against with the leave of the court. The commencement of an application under Section 32 in court does not halt the arbitration proceedings.

Section 32(4) makes provision for a double action in that a party may request a court to determine a jurisdictional challenge of an arbitral tribunal whilst the arbitration proceedings are in progress. Such a determination may be made either by agreement of all the parties, or with the permission of the arbitral tribunal after satisfying the court that the determination is likely to produce substantial savings in costs of the proceedings. It is not in all circumstances that a double action of the objection and the arbitration proceedings is favoured as it is seen as a duplication of evidence that is presented at the hearing of the dispute on the merits. There is a likelihood of this procedure being abused by a party who suspects that he may lose the dispute as the said party would seek the indulgence of the court whilst the arbitral proceedings are going on just to interfere or delay the arbitration process and in the process deny the other party justice. As the adage goes, justice delayed is justice denied.

Whilst the Model Law restricts court intervention at this stage by the use of a time limit, the English Act tends to be more relaxed, as it requires that the application be made without delay. This is open ended as without delay may be measured subject to the

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<sup>764</sup> Section 32 of the English Act: "(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. ... (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.... (6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the leave of the court..."



circumstances of each case, thus ending up with a disparity in the time limit within which to resort to court. Both the Model Law<sup>765</sup> and the English Act<sup>766</sup> respect the continuation of the arbitral tribunal's mandate by permitting it to continue with its work whilst a preliminary issue before the court is heard. This also prevents the court from being seen to be usurping the powers of an arbitral tribunal.

The English Act permits an appeal from the decision of the court with leave but only if such appeal is based on a point of law.<sup>767</sup> The decision of the court under the Model Law on the other hand, is not subject to appeal.<sup>768</sup> Article 16(3) of the Model Law gives power to a court to make a final decision on the question pertaining to the jurisdiction of an arbitral tribunal provided that the matter is raised within thirty days of a party's receipt of the arbitral tribunal's ruling on the preliminary jurisdictional question.

In the *AT & T Corporation*<sup>769</sup> case, the ICC ruled that the objection to the arbitral tribunal's jurisdiction was not a good challenge. Under the ICC, that decision was final, yet the party notwithstanding took the appeal right through the English courts up to the House of Lords. This case was decided under the former arbitration law of England prior to the enactment of the English Act. The previous Act permitted more court intervention than the current Act does. Unlike the Model Law, appeals are permissible under the English Act.<sup>770</sup>

### III.3 Interim Measures of Protection

During the course of the arbitration proceedings, a party may obtain an interim measure of protection from either the arbitral tribunal or from the court. This part of the study deals with the situation whereby a party seeks this remedy from a court. The discussion above has shown that the English Act permits appeals in a number of cases though with

<sup>765</sup> A/CN.9/216, paragraph 82

<sup>766</sup> Footnote No. 764, Section 32(4)

<sup>767</sup> *ibid*, Section 32(6)

<sup>768</sup> Footnote No. 506

<sup>769</sup> Footnote No. 751

<sup>770</sup> Footnote No. 668, page 628

leave. The court however assists the arbitration process by not providing for appeal when granting interim measures of protection that are sought during the course of the arbitration process. This prevents the dispute from being dealt with by the court. The aim of the court at this stage of the proceedings therefore is to exercise its discretion in such a way that it assists the progression of the arbitration process. An example of this is relief that a party that has not participated in the arbitration proceedings may seek from the court.<sup>771</sup>

The English Act permits courts to intervene in the arbitration process and exercise coercive power to ensure the compliance of an arbitral tribunal's orders.<sup>772</sup> An interim measure of protection should not be used by a party as a means to defeat the purpose of arbitration by blocking evidence that a party may wish to rely on before a team of arbitrators. This position was referred to in the *Associated Electric and Gas Insurance Services*<sup>773</sup> case. The Privy Council upheld the appeal on the ground that it was wrong to interpret a confidentiality agreement as preventing a party from referring to an award as that party would then be prevented from enforcing the award, which was the basis of the arbitration. This judgement was aimed at preventing the abuse of interim measures of protection. If anything interim measures of protection should be used to assist the process of arbitration and not frustrate it.

The English Act permits a court to grant a remedy staying the arbitration proceedings if a party does not wish to take part in the said proceedings. This is what the court decided in the case of *Law Debenture Trust Corp plc v. Elektrim Finance BV and others*.<sup>774</sup> The court held *inter alia* that:

*'An objecting party had a right to bring proceedings under section 72... the basis of the permitted challenge under section 72 was that the objecting person was not a party to what were ostensibly arbitration proceedings because those proceedings were not actually proceedings which could be asserted against him.'*<sup>775</sup>

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<sup>771</sup> Footnote No. 762

<sup>772</sup> Section 42(1) of the English Act

<sup>773</sup> Footnote No. 136

<sup>774</sup> (2005) 2 All ER (Comm) 476

<sup>775</sup> *ibid*

Prior to 2006, the Model Law only permitted courts to recognize and enforce arbitral awards made under Article 35 of the Model Law. The Model Law has now been revised<sup>776</sup> and now permits the recognition and enforcement of interim measures issued by an arbitral tribunal under Articles 17(1) novies. This provisions which is non-territorial, permits a party to request the recognition and enforcement of the interim measure in a court of the appropriate country. The intervention of the court at this stage of the arbitration proceedings is inevitable if enforcement of the interim measure is to take effect. The intervention is however qualified in that it is not applicable to the substance of the interim measure. The court may therefore not be able to question the reasons behind the arbitral tribunal making its decision. The Model Law under Article 17 decies now provides defences for refusing the recognition and enforcement of an interim measure.<sup>777</sup>

Section 16 of the Arbitration Act of Thailand permits a party to go to court if it seeks a provisional measure of protection whilst the arbitration is going on. This provision may however not be applicable if Thailand decides to adopt the revised version of Article 17.<sup>778</sup> Section 16 states that:

*“A party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures to protect his interest before or during the arbitral proceedings. If the court views that had such proceedings been conducted in court the court would have been able to issue such order, the court may proceed as requested...”<sup>779</sup>*

A court may also assist the arbitration process by enforcing an arbitral tribunal’s order that a party refuses to abide by, as the Model Law does not provide the tribunal with coercive power.

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<sup>776</sup> A/CN.9/592

<sup>777</sup> *ibid*, Article 17 decies

<sup>778</sup> *op cit*

<sup>779</sup> Section 16 of Thailand Arbitration Act

### III.4 Assistance in the Taking of Evidence

Article 27 of the Model Law<sup>780</sup> permits an arbitral tribunal or a party to request assistance from the court in the taking of evidence. The most common form of assistance that may be requested from the court is the taking of sworn evidence. An arbitral tribunal lacks coercive powers and may therefore not be in a position to enforce a summons if a witness fails to attend the arbitration proceedings or to produce documents. In such a case either the arbitral tribunal or a party may seek court assistance in order to ensure that the arbitration proceedings progress effectively. Article 1(2) of the Model Law reduces the application of Article 27 to the territory of the *lex loci*. Article 27 plays a supportive role to the process of international commercial arbitration. Arbitration proceedings may fail to be concluded effectively without the arbitral tribunal being able to collect all the evidence it believes is essential for it to make an award. Without this support it is possible to envisage a situation where witnesses choose not to come to give evidence before the arbitral tribunal even when summoned, or third parties refusing to produce documents when ordered to do so by the arbitral tribunal.

Section 34(2)(f) of the English Act,<sup>781</sup> like Article 27 of the Model Law, also gives power to a court to assist the parties in the taking of evidence and this power is exercised pursuant to the court's "rules on the taking of evidence,"<sup>782</sup> and upon a request being made to that effect by a party. Although the English Act contains some mandatory provisions, Section 34(2)(f) that permits courts to assist in the taking of evidence is not mandatory, but is only applicable subject to the parties' agreement.

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<sup>780</sup> A/CN.9/592, paragraph 94: "Another topic suggested for consideration to the Working Group was the revision of article 27 of the arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence ... It was suggested that article 27 could be revised to oblige a court to render such assistance..."

<sup>781</sup> Footnote No. 177

<sup>782</sup> Article 27 of the Model Law: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

## CONCLUSION

The discussion in this chapter has shown how court intervention acts as a safety mechanism to the arbitration process by providing support when necessary and ensuring that the decision of the parties to resolve their disputes using the process of arbitration is maintained and enforced. During the course of the arbitration proceedings, the arbitral tribunal is given power to deal with the disputes between the parties. This is a responsibility that the parties do not permit to be delegated to another body dealing with the resolution of disputes such as the courts. However, before the arbitral tribunal takes conduct of the arbitration proceedings and during the course of the arbitration a court may where parties permit, intervene in the arbitration process to deal with questions arising relating to the arbitral tribunal, procedural issues or issues relating to an urgent application for an interim measure of protection. The intervention of the court is however restricted to specific instances only. Therefore, although a party may want a matter to be dealt with by a court, this may only be possible if the parties' arbitration agreement makes provision for such a course of action.

The Model Law and the English Act provide in different ways the instances when a court may be permitted to intervene. The English Act maintains a system where the courts restrict appeals in arbitration cases by ensuring that leave is obtained before an appeal can proceed.<sup>783</sup> The English Act permits courts intervention according to the terms set out in Section 1(c) which intervention is in some cases mandatory.<sup>784</sup> Court intervention under the Model Law is permitted under the terms set out in Article 5.<sup>785</sup> Although seeming restrictive in its approach, Article 5 is favoured in this study as it ensures the least court interference in the flow of the arbitration process thus fulfilling the Model Law's major objective of party autonomy.<sup>786</sup> The fact that the court intervention is restricted to specific instances only, helps identify the process of international commercial arbitration as an independent dispute resolution mechanism.

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<sup>783</sup> Footnote No. 19, page 97

<sup>784</sup> Sections 9 & 12 of the English Act

<sup>785</sup> Footnote No. 665

<sup>786</sup> Footnote No. 404, page 51



The court intervention that is permitted before the arbitral tribunal takes control of the arbitration process is fundamental in the sense that it helps the parties maintain the status quo. A party may therefore be prevented from disposing of evidence or assets which step may make the ensuing arbitration proceedings an academic exercise. The court therefore holds the arbitration in place on behalf of the arbitral tribunal that is to be appointed by the parties. This type of court intervention acts as a supplement to the tribunal's powers. The court intervention that is sought by a party during the course of the arbitration proceedings when an arbitral tribunal is in control of the arbitration must be clear and precise as some of the relief sought at this stage of the proceedings may also be obtained from the arbitral tribunal itself. An example is the relief for an interim measure of protection. The courts must at this stage not be seen to be interfering or trespassing in the work of the tribunal, hence the need for courts to only intervene where the parties have expressly provided for such intervention. The courts therefore exercise their power to intervene at this stage of the proceedings with caution when a party is able to obtain the same relief sought from the arbitral tribunal.

Where the arbitral tribunal does not have the power to offer the required relief such as an exercise of coercive power, the courts come to the assistance of the arbitration process. Even in this situation however, where the court is being requested because the arbitral tribunal lacks a certain power, the parties must provide for such intervention. If there is a mandatory provision for court relief, then the courts must grant such relief as a matter of right not as a discretionary measure. The idea of requesting for interim measures of relief is so that the ensuring arbitral award meets its intended effect and can be enforced. The intervention of the court that is exhibited in the Model Law articles referred to above can be summed up as being supervisory and supportive and providing 'checks and balances' to the process of international commercial arbitration and ensuring the enforcement of the arbitral award.

The court intervention that both the Model Law and the English Act permit is really meant to be there to act as a support to the arbitration process and not an end in itself. This is emphasized by the Model Law requirement for the arbitration proceedings to

continue whilst court intervention takes place thus showing the ancillary role that the courts hold in the arbitration process. The power of the arbitral tribunal to get on with its work whilst applications are ongoing in court also prevents delay<sup>787</sup> and enables the arbitration proceedings to remain on course. Parties that choose to have their disputes resolved by way of arbitration are able to do so confidently knowing that the court will provide support only for purposes of ensuring the progress of the arbitration and the enforcement of the arbitral award. The court intervention discussed in this chapter therefore essentially acts as a rescue boat for the arbitration process once it finds itself in rough waters. The courts in support of the arbitration process assist and supplement the arbitration whenever necessary without interfering in the work of the tribunal.

It is clear from the discussion in this chapter that as things stand today, the intervention of the courts before the arbitral tribunal takes control of the arbitration process is inevitable in procedural and jurisdictional matters. However, the intervention during the course of the arbitration proceedings can be further restricted to those instances where the tribunal's power is limited such as in the taking of sworn evidence. This study shows a web in the relationship between courts and the process of international commercial arbitration that remains unbroken throughout the arbitration process. Alan Redfern and Martin Hunter call this kind of relationship a partnership though not of equals.<sup>788</sup>

Throughout this relationship it can be seen that courts exercise restraint through the use of discretionary powers in an effort of ensuring that matters that are the subject of arbitration are not pursued in court to a logical conclusion, as this would render the arbitral tribunal's work academic. In support of this principle, courts ensure that they do not deal with substantive issues as they lie in the exclusive domain of the arbitral tribunal. Courts have a duty of ensuring that private methods of resolving disputes within their

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<sup>787</sup> Smit (1998: 235): "While article 5 was criticized as excessively restrictive, the Commission found it necessary as a safeguard against dilatory tactics and abuse. The purpose of the provision is to increase certainty as to the maximum extent of judicial intervention..."

<sup>788</sup> Redfern (2004: 328): "Insofar as the relationship between national courts and arbitral tribunals is said to be one of 'partnership', it is not a partnership of equals. Arbitration may depend upon the agreement of the parties, but it is also a system built on law and which relies upon that law to make it effective both nationally and internationally... The real issue is to define the point where this reliance of arbitration on national courts begins and where it ends."

jurisdiction are conducted in a just manner, so that justice is done. At the end of the day a state's public policy may always influence the level of court intervention that may be permitted.

## CHAPTER SIX

### THE EXTENT TO WHICH A COURT MAY EXAMINE THE WORK OF AN ARBITRAL TRIBUNAL AFTER THE AWARD IS MADE

#### INTRODUCTION

The aim of this chapter is to examine the extent to which an arbitral tribunal's conduct and exercise of powers may be tested in court after the award is made. The study will show how the courts assume a supervisory and supplementary role at this stage of the arbitration. The intervention of the court in the award is restricted to limited circumstances and under limited grounds. It is also subject to the laws governing the arbitration at that stage of the arbitration when court recourse is sought.<sup>789</sup> Both the Model Law and the English Act provide the specific times when a party may seek the court's relief after the award is made. What will be evident from the study is that time when such relief may be sought is of the essence.

It is the position of this Thesis that the power of an arbitral tribunal to make an arbitral award emanates from the parties' agreement to arbitrate.<sup>790</sup> The parties to an arbitration agreement however, expect the arbitral tribunal to work within the precincts of its jurisdiction and in accordance with the adopted rules of arbitration subject to the laws that are chosen by the parties to govern the different aspects of the arbitration. The tribunal is expected to complete its mandate by making a final and binding award.<sup>791</sup> In some Model Law countries, the finality and binding nature of the award is limited to an arbitral tribunal's findings on the facts and generally its findings on the law. The award may therefore only generally be subject to the scrutiny of the courts on matters other than the arbitral tribunal's findings of fact. This however is not the case in England where court recourse against an arbitral tribunal's findings of fact and questions of law arising

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<sup>789</sup> Tweeddale (2005: 376 & 379)

<sup>790</sup> LG Caltex Gas Co. Ltd and another v. China National Petroleum Corporation and another [2001] BLR 235: "If there is no arbitration agreement, then there can be no authority in the arbitrator to determine any disputes between two parties."

<sup>791</sup> Footnote No. 652

out of the award is permitted.<sup>792</sup> On the whole however, a court may not set aside an award on the basis that the tribunal made an error of fact or law, even if the error is manifest.

The New York Convention, the Model Law and the English Act provide set grounds upon which court scrutiny may be permitted. This scrutiny may occur at the instance of a party that seeks enforcement of the award or has reason to believe that some of the objectives of the arbitration agreement are not fulfilled by the arbitral tribunal.<sup>793</sup> The court intervention at this stage of the arbitration may arise upon a party raising either a jurisdictional<sup>794</sup> or procedural challenge against an arbitral award. The court therefore assumes the supervisory role when dealing with the challenge to check whether the arbitral tribunal conducted the arbitration in accordance with the terms of the arbitration agreement and the governing laws. The chapter is divided into two sections. The first section looks at court recourse that the Model Law and the English Act permit. The second section analyses how courts intervene in the recognition and enforcement of an arbitral award.

## I COURT RECOURSE AGAINST AN ARBITRAL AWARD AS PERMITTED BY THE MODEL LAW AND THE ENGLISH ACT

This part of the study will identify the instances when a party may request a court to intervene in the arbitral award and the criteria upon which a court may be moved. The discussion will show the court's reaction to such requests for intervention.

### I.1 Court Intervention Permitted by the Model Law

The Model Law only offers one form of recourse against an arbitral award under Article 34. A party that wishes to challenge an arbitral tribunal's award is only permitted to do

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<sup>792</sup> Section 69(1) & (3)(c) of the English Act

<sup>793</sup> Park (2006: 71): "...some measure of judicial scrutiny over arbitral jurisdiction remains a vital safeguard to the integrity of the process, and constitutes an essential corollary to enforcement of legitimate awards."

<sup>794</sup> Footnote No. 589



so by applying to have the award set aside. Where an award is split into segments by an arbitral tribunal, and a final award is made in relation to one segment, a party may request an arbitral tribunal not to take any steps in the proceedings until after the objection raised under Article 34 is dealt with by the court. In such a situation the tribunal may instead of proceeding to complete dealing with the other segments of the dispute choose to wait to hear the court's ruling in relation to its first award. This is designed to save costs and speed up the arbitration proceedings.

Article 34 lays down a restrictive and exhaustive list of grounds upon which a court may set aside an arbitral award.<sup>795</sup> It is only when a party satisfies one of the grounds provided in Article 34 that an arbitral award may be set aside by a court at the seat of the arbitration. The said grounds are limited to procedural and jurisdictional issues and do not extend to substantive issues. This is a limitation and not a weakness as if courts were permitted to question the award on the merits they would in essence be interfering in the arbitral tribunal's jurisdiction and consequently be seen to be usurping its powers. The limitation is therefore important if the process of international commercial arbitration is to be protected in order for the parties to have their disputes resolved through the use of their chosen form of dispute resolution.

Courts exercise discretion when dealing with applications under Article 34 of the Model Law. This is evidenced from the wording of the first sentence in Article 34(2) which says that '*an arbitral award may be set aside*' and not '*an arbitral award must be set aside*' should any of the listed grounds be proved. The Model Law is however silent as to whether a party that is not satisfied with the decision of the court on this score may be permitted to appeal to a higher court. The general trend of the Model Law in its other provisions however is to only permit access to court intervention once without any appeal thereafter.

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<sup>795</sup> D. Frampton & Co. Ltd v. Sylvio Thibeault and Navigation Harvey & Freres Inc. (Federal Court of Canada, Trial Division, 7 April 1988, Unpublished: (1988) F.C.J. No. 305)

It may therefore be assumed that the reference to ‘a court’ in Article 34 of the Model Law implies that further court recourse in the form of an appeal may not be sought by a party. Article 1(2) of the Model Law exclusively gives power to a court at the seat of the arbitration<sup>796</sup> to examine the work of an arbitral tribunal after an arbitral award is made. Court recourse at this stage of the arbitration is therefore accessed in a territorial manner under the Model Law. The exception to this position is the legal system in India that permits the setting aside of an arbitral award that is made in another country.

There are therefore two ways by which an arbitral award may be set aside. The first one is by a party establishing one or more of the four grounds stated in Article 34(2)(a). The second way is by the court establishing either of the two grounds stated in Article 34(2)(b). In the case of *Navigation Sonamar Inc. v. Algoma Steamships Limited*<sup>797</sup> the court held that the reasons for setting aside an award had to be ‘appropriate, relevant and comprehensible.’<sup>798</sup> A conclusion that the reasons for setting aside the award were appropriate, relevant and comprehensible could only be reached after examining the arbitral award in its entirety. Mr Justice Gross in the case of *IPCO (Nigeria) v. Nigerian National Petroleum*<sup>799</sup> stated that:

“An award cannot be set aside for misconduct simply because the arbitrators have made an error of fact or law...”<sup>800</sup>

Mr Justice Gross in refusing to set aside the award in that case was exercising a limited supervisory jurisdiction rather than an appellate jurisdiction over the arbitration that was governed by the Nigerian Arbitration and Conciliation Act.

Article 34(3) of the Model Law places a restriction on a party’s access to court at this stage of the arbitration by setting a time limit of three months from the date of the award within which a party raising the objection to the arbitral award may apply for the setting

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<sup>796</sup> Footnote No. 789, page 372: “In most cases the courts with jurisdiction to hear the challenge will be those of the place in which the award was made.”

<sup>797</sup> Superior Court of Quebec, 16 April 1987, (published in French: (1987) R.J.Q. 1346)

<sup>798</sup> *ibid*

<sup>799</sup> (2005) 2 Lloyd’s Law Reports 326 at page 331

<sup>800</sup> *ibid*

aside of the award. Article 4 of the Model Law maintains that a party that sits on his rights and does not raise an objection within the prescribed period of time may be deemed to have waived his right of objection and may therefore be bound by the award. The setting aside of the arbitral award is the only remedy that Article 34 provides save for the times when it becomes necessary under Article 34(4) of the Model Law to give the tribunal another chance to make good the issues that may have resulted in the application to set aside the award. After the award is made, courts immediately take over the baton of power over the arbitration from the arbitral tribunal and any further applications that the parties to an arbitration agreement may wish to make are made to the court at the seat of the arbitration.

However, Article 34(4) offers a party an exclusive remedy aimed at giving the arbitral tribunal a chance to rectify the issues that may have resulted in an application to set aside the award. This remedy is subject to a request for the same being made by a party where appropriate. This provision is important in that it provides flexibility to the process of international commercial arbitration as the arbitral tribunal is granted a rare opportunity of “*eliminating the grounds for setting aside*”<sup>801</sup> the award. As long as the arbitral tribunal is still dealing with the dispute, the tribunal is not *functus officio*.<sup>802</sup> An arbitral tribunal may only become *functus officio* after it has rendered a valid and final decision in relation to the entire dispute that the parties may have requested it to resolve.<sup>803</sup>

An arbitral award usually marks the end of an arbitral tribunal’s powers, unless in exceptional circumstances where a municipal court exercises its remedy of sending the award back to the arbitral tribunal for correction pursuant to Article 33 of the Model Law. Any extension of an arbitral tribunal’s powers after the award may only be permitted pursuant to Article 34(4) or Article 33 of the Model Law. The arbitral tribunal may only restore arbitration proceedings to life on its own initiative after an arbitral award is made

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<sup>801</sup> Article 34(4) of the Model Law

<sup>802</sup> Burke (Jowitt’s Dictionary of English Law, Second Edition, 1977): “*Functus officio* – having discharged his duty – an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted.”

<sup>803</sup> Redfern (2004: 8-40)

in specific instances provided by Article 33(2). This can be done within a time limit of thirty days from the date of the award.<sup>804</sup>

This part of the study will deal with the grounds that may be raised to set aside an arbitral award in detail hereunder. The discussion will differentiate the procedural issues from the jurisdictional issues that a party may raise as a ground for setting aside the award.

### 1.1(i) Article 34(2)(a)(i) of the Model Law

Under the first permitted procedural ground that a party may raise in support of his application to set aside an arbitral award in the Model Law, the establishment of any of the following issues may suffice. These are:

- The incapacity of a party to an arbitration agreement and;
- The invalidity of the arbitration agreement under the law that it is subjected to or under the law at the seat of the arbitration.

Each party to an arbitration agreement has to satisfy the contractual capacity of the contract that in turn entitles him to enter into the arbitration agreement. The capacity of the parties to enter into a contract and consequently an arbitration agreement is essential if the arbitration agreement is to be recognized as valid. Each party must therefore first and foremost be of sound mind in order for them to be in a position to perform the obligations that are due to the other party and to discern the rights due to them and the role that the other party is to perform.<sup>805</sup>

It is only a party with capacity to enter into an agreement that may rightfully seek remedies from an arbitral tribunal or court where they are due. A court may for instance not be in a position to hear a party who is below the majority age as determined by the law governing the arbitration agreement.<sup>806</sup> Each party has an obligation to ensure the capacity of the party that he wishes to do business with. It is important that a party raises an objection immediately he has reasonable cause to believe that the other party is

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<sup>804</sup> Article 33(2) of the Model Law

<sup>805</sup> Park (2006: )26

<sup>806</sup> Mustill (2001: 62)

without capacity. Where this issue is discovered after the arbitral award is made, it may be used as a ground to set aside the arbitral award. An arbitral tribunal's jurisdiction may be challenged if there is no valid arbitration agreement in existence or if the agreement is not recognised by all the parties.

I.1(ii) Article 34(2)(a)(ii) of the Model Law

The second ground upon which an arbitral award may be set aside may be satisfied upon the establishment of any of the following positions:

- The lack of proper notice of the appointment of the arbitral tribunal or of the arbitration proceedings to the party contesting the award and;
- Circumstances arising that make the contesting party unable to present his case before the arbitral tribunal.

Like the first ground referred to above, the second ground that a party seeking recourse against an arbitral award from the court may use relates to procedural issues. It is mandatory that each party be given adequate information on what is happening in the arbitration. This assists a party to properly and adequately prepare his case. In cases where the parties are involved in the appointment of a tribunal, communication must be completed when the process is finalized. Where the appointment is made by a court an order of the court must be served on the parties as confirmation of the appointment of a tribunal. A set of arbitration rules may also put in place a communication procedure to ensure that all parties are aware of the members of the arbitral tribunal. In cases where an arbitral tribunal is involved in the appointment of an arbitrator, there has to be effective communication to the parties of the new appointee.

Once appointed, it is the responsibility of an arbitral tribunal to adequately serve notices on the parties of the arbitration proceedings. Without this notice, a party may fail to properly instruct his representatives and thereby be unable to present his case before the tribunal. Article 18 of the Model Law requires that the arbitral tribunal treats the parties to the arbitration agreement with equality.<sup>807</sup> The court stated in the *Corporacion*

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<sup>807</sup> Footnote No. 116



*Transnacional de Inversiones*<sup>808</sup> case that the purpose of Article 18 of the Model Law was aimed at protecting a party from ‘egregious and injudicious conduct by an arbitral tribunal’ and not protecting a party from its own failures. A party that is unable to present his case may raise an objection under this ground after the arbitral award is made. This is the downside of Article 18 as a challenge of being unfairly treated is only available after the arbitral award is made. The Model Law does not give power to an arbitral tribunal to deal with an objection that is raised based on Article 18.

A party that has participated in the appointment of an arbitrator may only challenge an arbitrator on issues that were not made known to him on appointment.<sup>809</sup> The burden of proof lies on that arbitrator to show that he was not aware of the reasons that are the basis of the challenge at the time of his appointment.<sup>810</sup> The Model Law provides for a party to object to the jurisdiction of an arbitrator it has appointed only if the objection relates to issues that are not disclosed by the arbitrator to the parties or brought to their attention prior to his appointment.<sup>811</sup>

#### I.1(iii) Article 34(2)(a)(iii) of the Model Law

An arbitral award may be set aside if it deals with a dispute that does not fall within the scope of the parties’ agreement to arbitrate. In this case, it is only that part of the award that deals with matters falling outside the scope of the arbitration agreement that may be set aside. This ground covers jurisdictional issues, in that it questions the extent of an arbitral tribunal’s authority. An arbitral tribunal may lack jurisdiction to deal with a dispute that does not fall within the scope of an arbitration agreement. Further, an arbitral tribunal may be acting in excess of its jurisdiction if it acts over and above its scope of authority.

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<sup>808</sup> Footnote No. 117

<sup>809</sup> A/10017, paragraph 67: “...A party should be permitted to challenge even the arbitrator nominated by him.... For circumstances unknown at the time of the nomination...”

<sup>810</sup> Caron (2006: 238)

<sup>811</sup> Article 12(2) of the Model Law: “...A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”

An arbitral tribunal may be lacking in jurisdiction if it deals with a dispute that is not covered by the arbitration agreement. The arbitral tribunal may decide on its own motion whether it has jurisdiction to deal with a particular subject matter or not usually in the first instance before a court finally deals with the issue. The precise wording of the arbitration agreement must be the arbitral tribunal's guiding factor as to the subject matter that the parties intend it to address.<sup>812</sup> Therefore if the parties wish the arbitral tribunal to deal with parts 'a' and 'b' of an issue that will have occurred as at the date of the appointment of the arbitral tribunal, the tribunal has got no jurisdiction to deal with parts 'c' and 'd' of the same dispute that arise after its appointment unless the parties have acquiesced.

If parties engaged in a ten-year oil contract disagree on the quality of oil in the fourth year of their contract, they may refer the dispute to an arbitral tribunal that will have jurisdiction to deal with the dispute as it is pertaining at December 2006 when it commences the arbitration proceedings. The arbitral tribunal may without the acquiescence of the parties not have jurisdiction to determine the issues arising in January 2007 relating to the amount due for the delivered oil. The issue arising in January after the appointment of the arbitral tribunal relating to the amount owing is an issue that will not fall within the scope of the arbitral tribunal's jurisdiction. An arbitral tribunal may lack jurisdiction in such a case. However, if the quality of the oil continues to be low in January, and that information is used as part of a party's evidence and accepted by the tribunal, the tribunal may be acting in excess of its jurisdiction. If the other party fails to raise an objection immediately he becomes aware of this situation, he may be in great danger of being deemed acquiesced to the tribunal's act of dealing with issues out-with its jurisdiction.

An arbitral tribunal is expected by the parties to conduct the arbitration proceedings and make an award whilst exercising its permitted powers. An arbitral tribunal's lack of jurisdiction or excess of jurisdiction must be differentiated with a tribunal's excess of power. Whilst the Model Law permits the setting aside of an arbitral award under this

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<sup>812</sup> Mustill (2001: 108)

ground for the lack or excess of jurisdiction, an arbitral tribunal's award that exceeds its power may not be set aside. This is because an arbitral tribunal that exceeds its powers does not necessarily act outwith its jurisdiction. A tribunal may, whilst within its scope of authority, exercise power over and above what the arbitration agreement has permitted it. Excess of power therefore relates to a power that an arbitral tribunal has, but which it exercises in excess.

For instance where the governing rules of arbitration provide that interest be calculated based on a simple interest rate and a tribunal decides to apply compound interest instead, it will not only have made a mistake, but have exceeded its permitted power of awarding interest. Whilst it has jurisdiction to award interest, it does not have the power to award it in compound form. Such excess of power may result in a mistake in the calculation of what is due to a party to whom interest is due. By virtue of a tribunal's actions, a party may be awarded a monetary award that he is not entitled to. A distinction must be drawn between a mistake that an arbitral tribunal makes during the course of its work and a mistake made as result of it having exceeded its powers. Whilst it is human to err, it is wrong for an arbitral tribunal to exceed its powers. Klaus Peter Berger states as follows in reference to this issue:

*"The mere fact that the tribunal has misinterpreted an ordinary provision of law never justifies the setting aside of the award, even though it may have had a decisive impact on the outcome of the case. This is the risk that a party accepts when agreeing to arbitration and to the principle of finality of arbitral awards..."*<sup>813</sup>

In the case of *Soviet Danube Steam Navigation Co. v. Travel Agency*<sup>814</sup> the court considered that the legal effectiveness of a foreign arbitral award cannot be contested because of the lack of a valid arbitration agreement, when the party that was affected by the award is, according to the law of the foreign country, no longer able to have the award set aside because of the expiration of the time limit for means of recourse.

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<sup>813</sup> Berger (2006: 578)

<sup>814</sup> [1991] XVI Yearbook Comm. Arbn 546

#### I.1(iv) Article 34(2)(a)(iv) of the Model Law

An arbitral award may be set aside if a party proves that the composition of the arbitral tribunal or the arbitration procedure is not in accordance with the arbitration agreement. The only exception to this ground is if the agreement of the parties is in conflict with a mandatory provision of the governing law of the agreement or of the law at the seat of the arbitration. This ground is aimed at giving precedence to the arbitration agreement. It demands that the composition of the arbitral tribunal as well as the procedures that are adopted in the arbitration proceedings conform to the requirements of the arbitration agreement. Where the agreement of the parties is in conflict with the law at the seat of the arbitration, this ground may not be used successfully to set aside the arbitral award.

#### I.1(v) Articles 34(2)(b)(i) and 34(2)(b)(ii) of the Model Law

An arbitral award may be set aside if the court finds that the issues in dispute are inarbitrable under the *lex arbitri* or that the arbitral award is in conflict with the public policy at the seat of the arbitration. These two grounds are used by a national system of law at the seat of the arbitration, through its court machinery to draw the boundary of the extent of an arbitral tribunal's powers in terms of the subject matter arbitrability and public policy limitations.<sup>815</sup> As with the other grounds discussed above, the inarbitrability of the subject matters in dispute and the public policy limitations are measured against the law as it pertains at the seat of the arbitration. The court may therefore set aside an arbitral award under these two grounds if it establishes that the award deals with a dispute that is inarbitrable or is contrary to the public policy of the seat of the arbitration respectively.

An initially valid arbitration agreement may if tainted with illegal activities such as bribery, corruption, fraud or money laundering become void<sup>816</sup> and may consequently

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<sup>815</sup> Chapter Four of Thesis

<sup>816</sup> Cremades (November 2003/January 2004: 78 – 79): "... There is no longer doubt that they can no longer be tolerated in international commerce....The *Bribe Payers Index* indicates that the perceptions of corruption are highest in the areas of public works and construction, arms and defense, and oil and gas – all sectors of major importance for international commercial arbitration."

lead to the setting aside of the ensuing award.<sup>817</sup> If however an allegation of any of these activities is made, entertained and rejected by an arbitral tribunal, then the award may be enforced by the enforcing state, as it will have emanated from a valid arbitration agreement. An error of fact or law by a tribunal may not generally be used as a ground for setting aside an award.

### 1.2 Permitted Objections to an Arbitral Tribunal's Award under the English Act

This part of the study looks at court recourse as it is permitted under the English Act. The discussion above showed how limited are the objections that are availed to a party under the Model Law after the arbitral award is made. Apart from a party establishing the procedural and jurisdictional faults against an arbitral tribunal before a court, the Model Law permits the court to set aside an award that is in conflict with a country's legal position on arbitrable matters and its public interest considerations. The English Act, like the Model Law recognizes the limited nature of the court's supervisory role over the arbitration once an arbitral award is made. The court intervention<sup>818</sup> that is permitted by the English Act is under very strict and limited terms. This study identifies three of the grounds that a party may rely on when seeking recourse against an arbitral tribunal's arbitral award from a court. These may be by way of an objection against an award or in the form of an appeal. The three grounds are:

- The challenge of an award based on an arbitral tribunal's substantive jurisdiction<sup>819</sup> pursuant to Section 67;
- A challenge based on serious irregularity affecting the tribunal and the proceedings or award pursuant to Section 68, and;
- An appeal to court by a party based on a question of law<sup>820</sup> arising out of the award pursuant to Section 69.

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<sup>817</sup> Footnote No. 7, Article 34(2)(v)

<sup>818</sup> Through Transport Mutual Insurance Association (EURASIA) Ltd v. New India Assurance Company Limited (2005) 1 Lloyd's Rep. 67

<sup>819</sup> Footnote No. 615

<sup>820</sup> *ibid*



This part of the study will discuss the three grounds upon which recourse to court may be obtained after an arbitral award referred to above is made.

1.2(i) A Challenge of an Award based on an Attack of an Arbitral Tribunal's  
Substantive Jurisdiction

A party to an arbitration agreement may challenge the final award of an arbitral tribunal under Section 67 of the English Act by querying the arbitral tribunal's substantive jurisdiction. The court places the burden of proof on the party that wishes to invoke Section 67. A jurisdictional challenge is essential in curing the excess of jurisdiction<sup>821</sup> or lack of jurisdiction of an arbitral tribunal.<sup>822</sup> An arbitral tribunal's failure to deal with the parties fairly may not constitute a jurisdictional challenge as it does not go to the root of the arbitral tribunal's jurisdiction but relates to its personal attributes.<sup>823</sup> The Act permits a party to raise an objection against an arbitral tribunal's substantive jurisdiction before a court during the course of the arbitration proceedings under Section 32 and after the award is made under Section 67.<sup>824</sup>

If any of the parties are not happy with the decision of the arbitral tribunal in an arbitration governed by English law, the same may be referred to the court and the court may either review the arbitral tribunal's decision or hear the proceedings *de novo* which decision may allow the court to hear the evidence concerning the jurisdictional question

<sup>821</sup> Footnote No. 380, page 533

<sup>822</sup> Footnote No. 18, paragraph 143: "A challenge to jurisdiction may well involve questions of fact as well as questions of law."

<sup>823</sup> JSC Zestafoni G Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd [2004] 2 Lloyd's Rep. 335 at page 364: "Colman J stated that "the principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under section 67 the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a section 67 application challenging the award."

<sup>824</sup> Section 67 of the English Act: "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court- (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restriction in section 70(2) and (3). (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction....(4) The leave of the court is required for any appeal from a decision of the court under this section."

afresh.<sup>825</sup> The way in which the court may intervene in the arbitration after the award is made, is dependent upon the parties' agreement.

An applicant that has participated in the arbitration proceedings may wish to challenge an arbitral tribunal's award under Section 67. This is because usually a party may only discover an arbitral tribunal's lack of jurisdiction or its having acted in excess of its jurisdiction after the arbitral award is made. It is usual for a respondent to challenge the jurisdiction of an arbitral tribunal although it is not unusual for a claimant to raise the objection. For example, in the case of *Primetrade AG*,<sup>826</sup> Primetrade instituted proceedings in court pursuant to Section 67 to challenge the jurisdiction of the arbitral tribunal. The court held that no right of suit had passed to Primetrade and accordingly, the arbitrators did not have jurisdiction to consider the owner's claims against Primetrade.

The court takes cognizance of the fact that the question of jurisdiction has already been dealt with by the arbitral tribunal, subject to instances when a party decides not to take part in the arbitration proceedings and instead seeks remedy directly from a court as permitted by Section 72. Under an application made under Section 67, the court may choose to review the decision of the arbitral tribunal. In such a case, the extent to which the court may permit fresh evidence relating to an issue already addressed by the tribunal will be limited. Permitting fresh evidence under such circumstances may prejudice the other party.<sup>827</sup> Fresh evidence may however be permitted if there is consent from the other party. The case of *R (on the application of Lunn) v. Governor of Moorland Prison*<sup>828</sup> is instructive here. Without the consent of the other party, an application may be made to the court.

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<sup>825</sup> Michael W. Buhler and Thomas H. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, (First Edition, Sweet & Maxwell, London, 2005), page 155

<sup>826</sup> Footnote No. 613

<sup>827</sup> Footnote No. 119

<sup>828</sup> [2006] All ER 377: "It is unnecessary in this case to consider the position in relation to an order which is unlawful on its face or which is made in excess of jurisdiction, though as appears from the authorities an order which is valid on its face is binding even if it was made in excess of jurisdiction and is therefore liable to be set aside."

In the case of *JSC Zestafoni*<sup>829</sup> the court refused to entertain a new jurisdictional challenge as *Zestafoni* failed to justify before the court why it had not raised the illegality point before the arbitrator. The discussion hereunder will deal with the arbitral tribunal's lack of and excess of jurisdiction that amounts to a violation of jurisdiction that an arbitral tribunal purports to have. It is this violation that a party may wish to halt when making an application for a jurisdictional challenge against an arbitral tribunal in court. The court's role is basically to investigate how an arbitral tribunal has exercised its substantive jurisdiction and to remedy the situation in instances where the tribunal has acted out-with its jurisdiction.

1.2(i)(a) Lack of Jurisdiction

An arbitral tribunal's lack of jurisdiction means that the jurisdiction of an arbitral tribunal to exercise a particular power does not exist. This may relate to an arbitral tribunal dealing with issues that do not relate to the contract at hand and consequently to the arbitration agreement. Alternatively, an arbitral tribunal may be dealing with an issue emanating from the contract between the parties but not within the scope of the arbitration agreement. An arbitral tribunal may not have jurisdiction to deal with an issue that falls outside the terms of the arbitration agreement. In the case of *Metal Distributors (UK) Ltd v. ZCCM Investment Holding Plc*,<sup>830</sup> for instance, MDL sought to have its counterclaim relating to debt restructuring determined by the arbitral tribunal.

Meanwhile the arbitration agreement did not extend to debt restructuring. The arbitral tribunal decided that it did not have jurisdiction to entertain the counterclaim. MDL applied to the court to set aside the arbitral award under Section 67 of the English Act. The court dismissed the application as the counterclaim arose under a separate contract. Cresswell, J stated among other things that:

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<sup>829</sup> Footnote No. 823

<sup>830</sup> Footnote No. 100

*“Where the claimant had a disputed claim which fell within an arbitration agreement, and the respondent raised a cross-claim which lay outside the clause, the arbitrator did not have jurisdiction to entertain the cross-claim..”*<sup>831</sup>

Alan Redfern and Martin Hunter also assert that:

*“Jurisdiction in relation to a counterclaim is occasionally contested by a claimant on the grounds that the respondent’s claims do not fall within the contract that contains the arbitration clause. If this is so, the arbitral tribunal has no option but to exclude it.”*<sup>832</sup>

The *JSC Zestafoni*<sup>833</sup> case referred to above shows how a party successfully invoked Section 67 of the English Act. The objection in this case arose as a result of variations to a multi-party agreement. The exchange of correspondence between the parties’ representatives gave jurisdiction to a sole arbitrator, Mr Kinnell, instead of a three-man tribunal as the initial arbitration agreement had provided. An agreement by the parties’ representatives through an exchange of mail resulted in the amendment of the terms of the arbitration agreement pertaining to the number of arbitrators and in essence gave jurisdiction to Mr Kinnell. When Fapet raised an objection to Mr Kinnell’s jurisdiction, he ruled that he had jurisdiction. An application that was made before the court to set aside the award because Mr Kinnell lacked jurisdiction, failed.

An arbitral tribunal only has jurisdiction to establish the rights and obligations of the parties to an arbitration agreement and in general not those of third parties.<sup>834</sup> By acting otherwise, the tribunal may be challenged for lack of jurisdiction. Leggatt J. stated in *The Eastern Saga*<sup>835</sup> as follows:

*“The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers should be excluded from the hearing and conduct of the arbitration...”*<sup>836</sup>

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<sup>831</sup> *ibid*

<sup>832</sup> Redfern (2004: 310)

<sup>833</sup> Footnote 823

<sup>834</sup> Davidson (2000: 19): “An arbitral tribunal is constituted by agreement and thus has no power over third parties.”

<sup>835</sup> [1984] 3 All ER 835 at 843c-d

<sup>836</sup> *ibid*

In the case of *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania*,<sup>837</sup> Lithuania challenged the jurisdiction of the tribunal, but the tribunal dismissed the objection and ruled it had jurisdiction as Lithuania was a party to the arbitration agreement.

In circumstances where the arbitral tribunal does proceed to establish the rights and obligations of purported third parties, the parties to the arbitration agreement must agree to have the arbitration agreement enforced by a third party.<sup>838</sup> In the case of *Azov Shipping Co.*<sup>839</sup> Azov challenged the arbitrator's award based on the fact that the arbitrator had no jurisdiction as Azov was not a party to the arbitration clause and could therefore not be bound by it. Rix J held that the justice of the case required that he agrees with Azov.

An arbitral tribunal's award may be challenged based on its lack of jurisdiction if it is proved that the arbitration agreement under which it is operating is not recognized by all the parties. In the case of *Arab National Bank v. El-Abdali*,<sup>840</sup> the court held among other things that the arbitral tribunal lacked jurisdiction as the arbitration agreement had been obtained by fraud and the arbitral tribunal had not been properly constituted.<sup>841</sup> In order for an arbitration agreement to be recognized as valid, it must in no uncertain terms, define the agreement of the parties, the dispute and the rules of law giving that relationship its efficacy. The burden of proof however lies with the party making the challenge. Parties to an arbitration agreement are obliged to ensure that they are in agreement on the alterations or amendments to the arbitration agreement that they wish to make if they are to maintain the validity of their agreement.

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<sup>837</sup> [2006] 1 Lloyd's Law Reports 181

<sup>838</sup> Footnote No. 805

<sup>839</sup> Footnote No. 640

<sup>840</sup> [2005] 1 Lloyd's Law Reports 541

<sup>841</sup> *ibid.*, at page 546: "On the basis of these facts, I am satisfied that the Bank has established on overwhelming evidence that the arbitral award has been obtained by fraud; that there was no arbitration agreement in force; that the arbitral tribunal was not properly constituted and that there was never any agreement as to the scope of the arbitration...."



### 1.2(i)(b) Excess of Jurisdiction

An arbitral tribunal that exercises authority over and above what the parties would wish it to exercise acts in excess of jurisdiction. In this situation, a tribunal may have jurisdiction to deal with an issue, but only to the extent permitted by the parties. For instance, the parties to an arbitral tribunal may appoint a tribunal to deal with a dispute arising from a party's failure to complete works on a project within a prescribed period of time. In such a case, the tribunal may have jurisdiction to deal with the dispute up to a specific date. If however, there is another dispute relating to the failure to pay for the services rendered, an arbitral tribunal may be acting in excess of jurisdiction if it deals with the monetary issue that though relating to the same contract is not covered by the arbitration agreement. An arbitral tribunal owes the parties an obligation to exercise caution and ensure that its powers are only exercised within the precincts of its jurisdiction. The parties have a prerogative to appoint another arbitral tribunal to deal with the other segment of their dispute. In the case of *Nisshin Shipping Co.*<sup>842</sup> the court held that the scope of the arbitration agreement was wide enough to cover the dispute between the respondent and the chartering brokers thus giving the tribunal jurisdiction in the matter.

An arbitral tribunal may be challenged by a party for exceeding its jurisdiction by dealing with a matter that is not submitted to it for arbitration. A case in point is the case of *National Insurance and Guarantee Corporation Ltd v. M Young Legal Services Ltd.*<sup>843</sup> In that case the court held that a claim in tort was outside the scope of the arbitration clause. Also in the case of *Pirtek (UK) Ltd*,<sup>844</sup> an arbitrator made a further award of interest after he had become *functus officio*. There was no evidence on record to show that he had been requested by the parties to make such an award. In the case of *Home of Homes Limited v. Borough of Hammersmith & Fulham LBC*<sup>845</sup> the court dismissed the application for the removal of the arbitrator for failing to conduct himself properly. The application alleged

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<sup>842</sup> Footnote No. 73

<sup>843</sup> [2005] 2 Lloyd's Law Reports 46

<sup>844</sup> Footnote No. 503

<sup>845</sup> (2003) EWHC 807

that the arbitrator had relied on issues that had not been raised before him in making the award.

#### 1.2(i)(c) Prerequisites of an Application Under Section 67 of the English Act

The English Act requires a party that wishes to invoke the jurisdiction of the court for purposes of examining the jurisdiction of a tribunal after an award is made under Section 67 to fulfill certain prerequisites. A party must satisfy the statutory requirements contained in Section 70(2) and (3)<sup>846</sup> and Section 73.<sup>847</sup> In addition to the statutory prerequisites herein, a party making the application for challenge of an arbitral award must notify the other party and the arbitral tribunal of his intention to lodge a challenge in court. The notification to the other party is important as it enables the other party to not only know that there may be a delay in the enforcement of the award, but to also prepare for the challenge of the award. The notification of the application for challenge of the award to the tribunal enables it to be aware that it may only become *functus officio* after its award withstands the challenge or appeal before a court.

Time within which a party may seek recourse from a court under Section 67 is of the essence and so is the need to exhaust all the available recourse as provided by the arbitration agreement. In so doing, the requirements of Section 73 as read together with Section 70 of the English Act must be taken into consideration. In the case of *Lafarge (Aggregates) Ltd v. London Borough of Newham*<sup>848</sup> the court held that the arbitrator had no jurisdiction in the dispute because the reference to him was not made in time in accordance with the provisions of the contract.

In the case of (1) *People's Insurance Company of China, Hebei Branch* (2) *China National Feeding Stuff Import/export Corporation v. Vysanthi Shipping Company*

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<sup>846</sup> Section 70 of the English Act: "(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted- (a) any available arbitral process or appeal or review, and (b) any available recourse under section 57 (correction of award or additional award). (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

<sup>847</sup> Footnote No. 595

<sup>848</sup> [2005] 2 Lloyd's Law Reports 577

Limited (*The “Joanna V”*),<sup>849</sup> the court refused to extend the time for challenging the jurisdiction of the arbitrator pursuant to Section 67 by holding that ‘any challenge to the arbitrator’s award on the question of jurisdiction had to be made within 28 days of the publication of the award, failing which the party objecting to the jurisdiction lost that right.’ In the case of *Kalmneft v. Glencore International AG and another*,<sup>850</sup> the applicant applied to set aside the arbitrator’s ruling on the ground that he had no jurisdiction, as there was no binding arbitration agreement.

Any objections to an arbitral tribunal’s substantive jurisdiction must be raised timeously if the objection is to be sustained. In the case of *Rustal Trading Limited v. Gill & Duffus SA*<sup>851</sup> the court stated that:

*‘There is however, a more fundamental objection of principle to a party’s continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time.’*<sup>852</sup>

In jurisdictions such as England, a party who makes it clear that his participation is without prejudice to his subsequent right to challenge the award does not waive that right. In the case of *Husmann (Europe) Ltd v. Al Ameen Development and Trade Co*,<sup>853</sup> the claimant raised an objection that the respondents were not a party to the arbitration as soon as it became aware that the respondents had become an incorporated company. The court decided that the claimant had not lost its right to challenge the award pursuant to Section 73 as it had raised the challenge before the arbitral tribunal immediately it became aware of the facts.

Section 67 of the English Act is strictly confined to challenges to the substantive jurisdiction of an arbitral tribunal. In order for a court to entertain an application under

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<sup>849</sup> (2003) 2 Lloyd’s Rep 617

<sup>850</sup> Queen’s Bench Division (Commercial Court) Hearing date 27 July 2001.

<sup>851</sup> Footnote No. 594

<sup>852</sup> *ibid*

<sup>853</sup> [2000] 2 Lloyd’s Rep 83

this section, two tests must be proved. Under the first test the arbitral award must expressly show that the objection being raised before the court was already raised before the arbitral tribunal. Under the second test there must be evidence showing that the arbitral tribunal considered the objection and made a decision thereto.<sup>854</sup> In the *LG Caltex Gas Co. Ltd*<sup>855</sup> case, one of the challenges that the respondents raised before the sole arbitrator was that they were not party to the contract and as such could not be bound by its terms. The court decided that the respondents had lost the right to object as they failed to protest to the arbitrator's jurisdiction to decide the issue of whether the contracts were binding or not.<sup>856</sup>

In the case of *Athletic Union of Constantinople*,<sup>857</sup> Athletic Union challenged the arbitrator's jurisdiction before the arbitrator who decided that he had jurisdiction. On appeal before the court, Athletic Union tried to raise a new ground for a jurisdictional challenge (which had not been raised before the arbitrator), alleging that it had never agreed to arbitration. The court held that since Athletic Union had not argued the issue that it had never agreed to arbitration before the arbitrator, it could not make such an argument before the court. Athletic Union therefore lost the right to challenge the award before the court by virtue of its failure to abide by Section 73.

## 1.2(ii) The Ground of Serious Irregularity

This part of the study covers the second ground upon which a party may be permitted to invoke the court's intervention after the arbitral award is made under the English Act. The ground of serious irregularity is so wide such that it covers most challenges other than the excess of jurisdiction that may be raised in court against an arbitral tribunal after the arbitral award is made. The Act places the same statutory prerequisites that a party must abide by before invoking Section 68 as those discussed above.<sup>858</sup> The ground is however not concerned with the correctness of an arbitral tribunal's decision, but in the

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<sup>854</sup> Footnote No. 43

<sup>855</sup> [2001] BLR 235

<sup>856</sup> *ibid*

<sup>857</sup> Footnote No. 98

<sup>858</sup> Section 68(1) of the English Act

way that the tribunal has conducted itself and exercised its powers.<sup>859</sup> It is noteworthy that the ground for serious irregularity is not found under the Model Law. Section 68(2) of the English Act defines serious irregularity as follows:

*“Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-*

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);*
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction;*
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
- (d) failure by the tribunal to deal with all the issues that were put to it;*
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*
- (f) uncertainty or ambiguity as to the effect of the award;*
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
- (h) failure to comply with the requirements as to the form of the award; or*
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.”<sup>860</sup>*

This section therefore makes available wider avenues to a party that wishes to rely on it to challenge the arbitral tribunal’s award. It does not however cover a jurisdictional challenge. This ground may therefore be used to challenge an arbitral tribunal that is acting within its jurisdiction, but that has failed to meet the standard required of Section 68(2). In order for this ground to be invoked, a party must prove that an arbitral tribunal’s actions constituted substantial irregularity to the contending party. A mere error of law that would result in an arbitral tribunal arriving at a wrong decision does not suffice. In the *Lesotho Highlands*<sup>861</sup> case, the court concluded that the arbitral tribunal’s selection of the wrong exchange rates did not constitute an excess of jurisdiction under Section 68(2)(b).

<sup>859</sup> *Protech Projects v. Al-Kharafi* [2005] 2 Lloyd’s Law Reports 779 at page 784

<sup>860</sup> *op cit*, Section 68(2)

<sup>861</sup> Footnote No. 68, page 287



The case of *Mobile Oil Indonesia, Inc. v. Asamera Oil (Indonesia), Ltd*<sup>862</sup> illustrates the thin line between an arbitrator's excess of power and an incorrect decision of an arbitral tribunal.<sup>863</sup> Whilst a court could set aside an arbitral award for an arbitrator's excess of power, it may take a long haul for the court to set aside<sup>864</sup> the award by virtue of the fact that an arbitrator misinterprets the facts of the case.<sup>865</sup> In the *Lesotho Highlands*<sup>866</sup> case, the court decided that the arbitral tribunal's choice of currency did not constitute an excess of powers but was instead an error of law. The court further held that the arbitral tribunal's action of applying a wrong exchange rate of interest which was prevailing 42 days before the closing date for submissions of tenders instead of the current rate of interest amounted to an error of law. The arbitral tribunal's award was left untouched by the court despite the tribunal having been wrong in law.

When one looks at the interpretation of a tribunal's excess of power, one is inclined to come to a conclusion that the tribunal's application of a wrong currency and its use of a wrong interest rate in the *Lesotho Highlands*<sup>867</sup> case both actually amount to a mistake and excess of jurisdiction on the part of the tribunal. In that case the question before the court was whether an alleged error of the arbitral tribunal in interpreting the contract amounted to an excess of power necessitating the court to intervene. The court decided that it could not intervene in the arbitral tribunal's decision, as the arbitral tribunal's erroneous exercise of its available powers did not constitute an excess of power. Even if an arbitral tribunal errs in performing its duties, a national court may not intervene to correct the error, as the arbitral tribunal would have made the error whilst conducting itself within the confines of its jurisdiction. As the adage goes, to err is human.

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<sup>862</sup> 487 F. Supp. 63 (S.D.N.Y. 1980)

<sup>863</sup> Park (2006: 498)

<sup>864</sup> Footnote No. 737

<sup>865</sup> *Inter-City Gas Corp. v. Boise Cascade Corp* [845 F. 2d 184 (8<sup>th</sup> Cir. 1988)]

<sup>866</sup> Footnote No. 68, page 266: "...An error however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure." "If the tribunal erred in any way, it was an error within its power."

<sup>867</sup> *ibid*

In the case of *Margulead Ltd v. Exide Technologies*<sup>868</sup> the Court held that in order for the ground of serious irregularity to be established, it had to be shown that the arbitral tribunal had failed to comply with its general duty under Section 33(1) of the English Act.<sup>869</sup> The failure by an arbitral tribunal therefore to address a claim presented to it by the parties may, if proved, amount to a procedural irregularity that is serious.

In the case of *Vee Networks Limited v. Econet Wireless International Limited*<sup>870</sup> the applicant sought to set aside the partial award made in favour of the respondent under Section 67. The application contended that the arbitration agreement was *ultra vires* and could therefore not give any jurisdiction to the arbitrator to determine the preliminary issues that led to his making the partial award. The court held that there had been a serious irregularity on the part of the arbitrator as he relied on irrelevant statute whilst interpreting the memorandum of association. The arbitrator did not put the points before the parties for their comments and his action amounted to substantial injustice.

It is not in all situations however that the serious irregularity results from the tribunal's personal defects. This can be seen from the definition of serious irregularity referred to above. In the *Fidelity Management SA v. Myriad International Holdings BV*<sup>871</sup> case the court stated that:

“...clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.”<sup>872</sup>

National systems of law through their court machinery have a responsibility of accepting applications when permitted for purposes of remedying what may have gone wrong in the parties' private agreement. In the *Tame Shipping*<sup>873</sup> case, the court stated that it could intervene in arbitration proceedings if requested, if there was a purported irregularity

<sup>868</sup> [2005] 1 Lloyd's Law Reports 324

<sup>869</sup> *ibid.*, at page 330

<sup>870</sup> (2005) 1 All ER 303

<sup>871</sup> [2005] Lloyd's Law Reports 508 at page 509

<sup>872</sup> *ibid*

<sup>873</sup> Footnote No. 380, page 530

capable of causing substantial injustice. The court in the case of *Torch Offshore LLC v. Cable Shipping*<sup>874</sup> referred to the test of substantial injustice as one that is:

*“... intended to be applied by way of support for the arbitral process, not by way of interference with that process.”*<sup>875</sup>

### 1.2(iii) An Appeal based on a Question of Law Arising out of the Award

The third ground that the English Act makes available to a party that wishes to contest the arbitral tribunal’s award is based on the questions of law arising in the arbitral award.<sup>876</sup>

In order for Section 69 of the English Act to be invoked by a party, he must show to the court that he has abided by its statutory standards. Firstly, the award upon which the challenge is based must contain reasons. Secondly, all parties to the arbitration agreement must agree to the appeal. Further, the court must permit this course of action by granting the leave to appeal to the contesting party.<sup>877</sup> The court may only grant the leave if the applicant satisfies the prerequisites contained in Section 69(3).<sup>878</sup> The English Act places these statutory standards as a precautionary measure against the misuse of the ground. An application under this ground falls under the exclusive jurisdiction of the courts at the seat of the arbitration.

Like the Model Law, the English Act does not permit the challenge of an arbitral tribunal’s award based on questions of fact. The fact that a court cannot entertain a challenge relating to how an arbitral tribunal dealt with the facts of the case was stated in the *Taylor Woodrow Holdings*<sup>879</sup> case. Although an arbitral tribunal’s conclusions

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<sup>874</sup> Footnote No. 382, page 370

<sup>875</sup> *ibid*

<sup>876</sup> Footnote No. 187

<sup>877</sup> Section 69(2) of the English Act

<sup>878</sup> *ibid*, Section 69(3): “Leave to appeal shall be given only if the court is satisfied- (a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award- (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”

<sup>879</sup> Footnote No. 17, page 747: “Whereas the arbitrator is the parties’ chosen tribunal for all questions of fact, this court is the parties’ chosen tribunal for any question of law arising.”

drawn from its findings of fact cannot be the subject of an appeal, a court may intervene if the tribunal arrives at a wrong conclusion by virtue of it having misinterpreted the law.<sup>880</sup> This was the position taken in the *Kershaw Mechanical Services*<sup>881</sup> case. In order for a court to be able to intervene however, there must be evidence to show that the arbitral tribunal did not interpret or apply the law correctly in its award. An arbitral tribunal owes the parties to an arbitration agreement the duty to interpret the governing laws correctly in its arbitral award.<sup>882</sup>

It must be stated however that the parties in the *Lesotho Highlands* case chose by agreement to opt out of challenging an arbitral award based on a point of law arising out of the award.<sup>883</sup> As such none of the parties could invoke Section 69 of the English Act. As much as the parties may exercise their right to opt out of any statutory remedy, it may be to a party's detriment if an arbitral tribunal's award is wrong in law. The House of Lords in the *Lesotho Highlands*<sup>884</sup> case recognized that there was an error of law but it decided that the error did not amount to an excess of power. The court stated in the *Kershaw Mechanical Services*<sup>885</sup> case that "*the consequence in the Lesotho Highlands case was that the House of Lords refused to set aside or remit an arbitral decision, which was wrong in law.*"<sup>886</sup> The position that the House of Lords took in the *Lesotho Highlands* case in relation to the erroneous application of the law had also been accepted in earlier decisions in other jurisdictions. For instance, in the case of *Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt*,<sup>887</sup> the court held that the arbitral tribunal had made a procedural decision that led to the misapplication of the substantive law. Also in the case of *Baker Marina v. Danos*<sup>888</sup> the court stated *inter alia* that:

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<sup>880</sup> op cit

<sup>881</sup> Footnote No. 19, page 82

<sup>882</sup> Footnote No. 425

<sup>883</sup> Footnote No. 668: "The right to contract out under s. 69 thus presented an optional and consensual facility directed at reinforcing these two key principles....of finality and party autonomy"

<sup>884</sup> op cit

<sup>885</sup> Footnote No. 19, page 93

<sup>886</sup> ibid

<sup>887</sup> 939 F. Supp. 907 [1996]

<sup>888</sup> Footnote No. 62

*“An award cannot be set aside for misconduct simply because the arbitrators have made an error of fact or law.”<sup>889</sup>*

Once a court is satisfied that a party has proved his case under this ground of appeal, it may grant an appellant any relief permitted by Section 69(7) of the English Act, which provides as follows:

*“On appeal under this section the court may by order-*

- (a) confirm the award,*
- (b) vary the award,*
- (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or*
- (d) set aside the award in whole or in part.*

*The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”<sup>890</sup>*

The option of remitting the case to the arbitral tribunal for reconsideration is also available under the Model Law as discussed earlier in this chapter. The idea of remitting the case to the tribunal enables the tribunal to resolve the parties’ dispute in finality and in accordance to the parties’ chosen method of dispute resolution thereby reinforcing the main objectives of the process of international commercial arbitration.

## II COURT INTERVENTION IN THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

An arbitral award once made takes effect the minute it is served on the parties to the arbitration agreement. Once served the arbitral award binds the parties to their obligations in the arbitration agreement. The successful party may invoke the jurisdiction of a court for purposes of having the arbitral award confirmed in the country where the other party has assets. The jurisdiction of the court at the enforcement stage of the arbitration is therefore non-territorial.<sup>891</sup> The discussion hereunder shows how a party

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<sup>889</sup> *ibid*

<sup>890</sup> Section 69(7) of the English Act

<sup>891</sup> Footnote No. 543



may seek the court's intervention so that his award is confirmed and he is in a position to have it enforced. The study will also look at the grounds that a court requires a party to prove in order for it to have the arbitral award recognized and enforced.

The study will begin by discussing the position as it pertains under the New York Convention, the Model Law and under the English Act. This study takes cognizance of the fact that the New York Convention is the major treaty that governs the recognition and enforcement of foreign arbitral awards.<sup>892</sup> Consequently, whilst a party may abide by the terms provided by either the Model Law or the English Act, it is also bound by the standards for the recognition of foreign arbitral awards set by the New York Convention. This is applicable to the extent that the country in which the recognition and enforcement of the arbitral award has acceded to the New York Convention.<sup>893</sup>

## II.1 Under the New York Convention

The New York Convention permits a court in a country in which a party wishes to rely on the arbitral award to recognize and enforce the award when requested to do so by a party. This permission may however only be granted to a party that fulfills the requirements provided in Article IV of the New York Convention.<sup>894</sup> The New York Convention lays down five defences that a party may use to object the enforcement or recognition of the arbitral award by a court.<sup>895</sup> In addition to these defences, a court may at its own instance refuse to confirm the arbitral award if it finds that the arbitral award deals with a dispute that is not arbitrable under the country in which it is to be relied upon or if confirming it

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<sup>892</sup> Footnote No. 542

<sup>893</sup> Article X(1) of the New York Convention: "Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such declaration shall take effect when the Convention enters into force for the State concerned."

<sup>894</sup> *ibid*, Article IV: "1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

<sup>895</sup> *ibid*, Article V(1)

would be contrary to the public policy of the enforcing country.<sup>896</sup> The defences may be summed up as relating to the personal defect of the arbitral tribunal, questions touching on its substantive jurisdiction, the fundamental integrity of the process, and the public policy considerations at the place where enforcement of the arbitral award may be sought.

Refusal of recognition of an arbitral award is therefore restricted to these defences under the New York Convention. These defences are reflected in the Model Law and in the English Act. If any of these defences are proved before the court, the arbitral award may not be confirmed in that country. This does not however prevent the successful party from seeking enforcement in another country where the other party has assets. In ICC arbitrations, a court may be requested by a party to make an order for post award attachments, which provide a guarantee for enforcement.

Article V(1)(c) of the New York Convention gives power to a competent court to refuse recognition and enforcement of an award if it is established that the arbitral award deals with a subject matter that is out with an arbitral tribunal's jurisdiction. Under this clause, a court may confirm part of the award that deals with issues fall within the jurisdiction of the tribunal. The New York Convention does not expressly state whether there is a sequence to follow in relation to the setting aside of an arbitral award and the refusal of its recognition and enforcement. What is clear however is that once the jurisdiction of an arbitral tribunal is successfully challenged and the arbitral award set aside, the essence of it being recognized and enforced will depend upon the approach that the enforcing country may have. Some countries may not want to be bound by the decision of the country in which the application for setting aside an award may have been made. If for instance, the country in which the application for setting aside the arbitral award and the country where enforcement is sought are both Model Law countries, their approach on issues may be the same.

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<sup>896</sup> *ibid*, Article V(2)

There have been rare occasions when Article VII(1) of the New York Convention<sup>897</sup> has been used to override Article V(1)(e) and consequently permit the recognition and enforcement of an arbitral award that has been annulled in the country in which it was made. A case in point is the *Chromalloy Aeroservices v. Arab Republic of Egypt*,<sup>898</sup> where the court allowed the enforcement of an award that was made in Egypt when the Egyptian Court of Appeal had annulled it. The court relied on Article VII of the New York Convention when enforcing the award instead of Article V(1)(e).

The case of *Paklito Investment Ltd v. Klockner (East Asia) Ltd*<sup>899</sup> is an example of a court's reliance on Article V(1)(e) of the New York Convention. The court showed that a losing party could not seek to challenge the recognition and enforcement of an award after it had unsuccessfully sought to challenge the award before another court. It stated that:

*"...a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition."*<sup>900</sup>

The ground for refusal of enforcement in Article V(2)(b) of the New York Convention has been considered by some case law to be too narrow in the sense that it may only be satisfied in situations where there is a fundamental infringement of morality and justice.<sup>901</sup> Public policy considerations are interpreted on a case-by-case basis. As such an arbitral award that is not enforced in one country as a result of the country's public policy considerations may be confirmed in another country as long as the arbitral award is capable of being relied upon there.

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<sup>897</sup> Article VII (1) of the New York Convention: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

<sup>898</sup> Footnote No. 887

<sup>899</sup> [1992] 2 HKLR 39

<sup>900</sup> *ibid*

<sup>901</sup> Footnote No. 571

## II.2 Under the Model Law

A final arbitral award is binding on the parties, but may only be enforced by a court.<sup>902</sup> A party wishing to have the arbitral award confirmed for purposes of recognition and enforcement needs to seek court recourse in the country where such enforcement is sought. From the way that Articles 34, 35, and 36 of the Model Law are drafted, it is clear that the draftsmen wanted to permit court intervention only after the arbitral tribunal had been accorded an opportunity of making its award, hence confirming the restrictive nature of the intervention permitted at this stage of the arbitration.

Article 35 provides for the universal recognition of an arbitral award irrespective of the country where it may have been made.<sup>903</sup> This exhibits its non-territorial nature. The remedy of enforcement of the arbitral award may be sought from a court in the country where a successful party believes the respondent to have assets, or a court in any country where he wishes to have the arbitral award enforced. In permitting court intervention at this stage of the arbitration, the Model Law is silent on the time frame within which a party may seek enforcement of the arbitral award after it is made. In the same vein, there is no provision of the time within which a party may object to the enforcement. The silence therefore gives the enforcing country power to apply its own rules on time within which an objection may be lodged once an application for the recognition and enforcement of the arbitral award is made.

The party against whom enforcement may be sought is permitted very limited defences by the Model Law.<sup>904</sup> The defences are almost identical to those provided by the New York

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<sup>902</sup> Article 35 of the Model Law: "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language."

<sup>903</sup> Footnote No. 206

<sup>904</sup> Article 36 of the Model Law: "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication

Convention discussed above. Article 36(1)(a) of the Model Law lays down the permitted grounds upon which a party refusing enforcement may rely on. Article 36(1)(b) on the other hand contains grounds that a court may on its own accord apply to refuse to grant the application for the recognition and enforcement of the arbitral award. Article 36 restricts court intervention by only dealing with the enforcement of arbitral awards and not orders made by the arbitral tribunal. The permitted grounds for refusing the recognition and enforcement of an arbitral award are limited to procedural issues and not to the substantive issues in dispute.

The Islamic Republic of Iran is one of the few exceptional countries that re-modeled the Model Law to such an extent that it has in essence changed the objectives of the Model Law. Iran did this by omitting Articles 1(2) and 36(1) of the Model Law.<sup>905</sup> By so doing, the Republic of Iran does not recognize the restriction on territory in the application of the Model Law. It does not also place any restriction on the grounds upon which a party may rely on when objecting to an application for the recognition and enforcement of an arbitral award. The Republic of Iran has further not acceded to the New York Convention. It thus applies different standards to foreign arbitral awards, thus defeating the objective of harmonization that the Model Law and the New York Convention were designed to achieve.

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thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or as been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court finds that: (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State. (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”

<sup>905</sup> 1997 Iranian International Commercial Arbitration Law 87



This has consequently affected the way in which foreign arbitral awards are viewed in Iran. In spite of it having watered down the standards that are set by the Model Law and the New York Convention, the Islamic Republic of Iran may still be regarded as being capable of accepting foreign arbitral awards as it has adopted Article 35 of the Model Law. This is however open to challenge as the Model Law applies to international commercial arbitration within the meaning of Article 1 of the Model Law. But the Iranian law on arbitration has not adopted Article 1(2) of the Model Law hence leaving much doubt on its capability to accommodate foreign arbitral awards. Iran requires that foreign arbitral awards be declared enforceable by the courts at the seat of arbitration, before enforcement may be obtained there.<sup>906</sup> Such an award may be enforced as a foreign judgment.<sup>907</sup>

The adoption of the Model Law by the Republic of Iran may be regarded as having departed somewhat from the language of the Model Law. A question may be raised here whether the Republic of Iran's stance fits into the notion advocated by the Dervaird Scottish Advisory Committee that took the position that any departure from the Model Law be done only to the extent that it fits into a country's legal system.<sup>908</sup>

### 11.3 Under the English Act

The enforcement and recognition of an arbitral award under the English Act is restricted by a mandatory provision demanding leave from a court before the application may be entertained.<sup>909</sup> The need for leave of court is an essential prerequisite that extends to all arbitral awards in international commercial arbitration that are to be confirmed under the English Act.<sup>910</sup> Leave may be refused if:

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<sup>906</sup> Section 1295 of the Iranian Civil Code

<sup>907</sup> Article 169 of the Civil Judgments Act

<sup>908</sup> Footnote No. 6

<sup>909</sup> Section 66(1) of the English Act

<sup>910</sup> *ibid*, Section 101(2): "A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."

“...the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award...”<sup>911</sup>

Apart from the requirement for leave of the court, a party seeking to have his arbitral award enforced under the English Act must also abide by the terms and conditions set by Section 102<sup>912</sup> amongst others.<sup>913</sup> The validity of the award at the seat must be ascertained.<sup>914</sup> Where these terms are met, a court may confirm an arbitral award in the form of a judgment.<sup>915</sup> A court reserves the right to refuse to recognize or enforce an arbitral award if a party against whom enforcement is sought proves any of the six grounds provided by Section 103(2).<sup>916</sup> A proof of any of the procedural and jurisdictional defects may suffice to have the recognition or enforcement sought refused. In the case of *Northrop Corporation v. Triad International Marketing, S.A.*<sup>917</sup> the court held that absent manifest disregard of the law, “mere error in interpretation of...law” would not be enough to justify refusal to enforce the arbitrator’s decision.”<sup>918</sup>

Exceptional circumstances may sometimes cause a court to exercise discretion and refuse to confirm an award as was the case in *Arnold v. National Westminster Bank Plc.*<sup>919</sup> It is open to debate whether a court should refuse to confirm an arbitral award based on reasons raised by the court at the seat of the arbitration which reasons the court in the enforcing country does not recognize as necessitating the refusal to confirm an arbitral award. By doing so however, the court may be viewed as exercising its discretion in contradiction to Section 103(f) of the English Act.

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<sup>911</sup> *ibid*, Section 66(3)

<sup>912</sup> Section 102 of the English Act: “(1) A party seeking the recognition or enforcement of a New York Convention award must produce- (a) the duly authenticated original award or a duly certified copy of it, and (b) the original arbitration agreement or a duly certified copy of it. (2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.”

<sup>913</sup> *ibid*, Section 103(3), (4) and (5)

<sup>914</sup> *ibid.*, Section 103(2)(f)

<sup>915</sup> *ibid*, Section 101(3)

<sup>916</sup> *ibid*, Section 103(2)

<sup>917</sup> 811 F. 2d 1265 (9<sup>th</sup> Cir), cert. Denied, 108 S. Ct. 261 (1987)

<sup>918</sup> *ibid*, at 1269

<sup>919</sup> [1990] Chancery Division 573

In the *Westacre*<sup>920</sup> case, the court stated that the allegation of bribery had been addressed and rejected by the arbitral tribunal and as such there was no need for the issue to be decided by the court at enforcement. The case of *Soleimany v. Soleimany*<sup>921</sup> decided amongst other things, the non-enforceability of illegal contracts due to public interest considerations. Some countries may view such issues relating to transfer of firearms or chemical weapons as being in the public interest and therefore too politically sensitive<sup>922</sup> for an arbitral tribunal to deal with.<sup>923</sup> In such a case, a court may exercise discretion and refuse to enforce the arbitral award on that ground.

## CONCLUSION

Although the level of court intervention in arbitration has sometimes received criticism,<sup>924</sup> the discussion in Part Two of this Thesis, has shown that the level of intervention is only permitted to the extent necessary by the Model Law, the English Act and the New York Convention. It is permitted in a systematic way to ensure that the work of the arbitral tribunal and the exercise of its powers is not disrupted.<sup>925</sup> For instance, a party is able to use the court to raise an alarm when an arbitral tribunal oversteps its authority. Although the role of the court is described as an intervention in the arbitration process, it is really there to support and ensure the workability of the arbitration procedure. As has been discussed in this chapter, the supervisory role that the court assumes after an arbitral award is made is only accessible on request and again under strict terms

Once the court is permitted to review the work of an arbitral tribunal, the extent to which a party may access the court to seek remedies is heavily restricted under the Model Law.

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<sup>920</sup> Footnote No. 565: This case may be distinguished from the case of *Soleimany v. Soleimany* which had an element of corruption or illicit practice which was not the case with the *Westacre* case.

<sup>921</sup> Footnote No. 577

<sup>922</sup> Footnote No. 487

<sup>923</sup> *op cit.*, at page 800 – The court refused to enforce the Beth Din award giving effect to a smuggling operation by family carpets business.

<sup>924</sup> Lew (2003: 358): “Supervisory court intervention has the potential of seriously disrupting the arbitration process and impeding the parties’ quest for a speedy dispute resolution.”

<sup>925</sup> Footnote No. 667

This is however not the case with the English Act. Having said that one finds that the English Act still controls the extent to which a party may continue to access the court process for remedies by demanding that leave to appeal be sought before court process may be accessed further. This is a mandatory requirement from which a party may not derogate.

The applications that a party may make in court after an arbitral award is made, enables a court to examine and test the work of the arbitral tribunal. This act acts as a check and balance to ensure that the arbitral tribunal works within the confines of its jurisdiction under the terms and conditions that are set for it by the parties in their arbitration agreement. This helps to ensure that party autonomy is upheld to the extent necessary. Further, the court also works to the benefit of its system of law by ensuring that its laws are respected and followed by the parties in their private dispute resolution arrangements.

By virtue of the New York Convention, a number of countries in the world are able to pay allegiance to the principles that international commercial arbitration seeks to promote. Most countries therefore recognize international commercial arbitration as one of the leading methods of dispute resolution, which gives parties the autonomy to make important decisions affecting the way in which their disputes may be resolved as they arise. It eases the difficulties of international businessmen that have to deal with more than one system of law. The system of international commercial arbitration is in countries like England recognized to be at par with the court system. This may be evidenced from the way that the English Act enforces arbitral awards. Once enforced, an arbitral award is given the same status as a court judgment.

The intervention that national courts exercise in applications for jurisdictional challenges take cognizance of the fact that an arbitral tribunal has dealt with the matter already; that is in relation to applications that are made before the arbitral tribunal in the first instance. Such applications are therefore in the form of a re-hearing and not dealt with as a fresh application. In cases where a party chooses to go straight to court and not permit an arbitral tribunal to determine his jurisdictional challenge, this enables a court to deal with

the application as a fresh one. This is aimed at ensuring that national courts do not perform the function of an appellate court, but should just be there to assist the arbitral process by ensuring that the arbitral tribunal performs to the parties' expectations and agreement. This encourages a lot of transparency in the settlement of disputes. The fact that parties are able to challenge an arbitral tribunal in relation to its jurisdiction gives the parties confidence in the system and it also assures them of fair play at the end of the day.



## FINAL CONCLUSION

This study has shown that an arbitral tribunal's powers emanate from the agreement of the parties. The powers are exercised in the way that the parties want them to be exercised subject to the limitations that the governing legal system provides. In conducting the arbitration proceedings and making the award, an arbitral tribunal may exercise any powers that the parties may avail it. The extent to which this may happen is determined by the agreement of the parties, the procedural law and the rules of arbitration that the parties choose. The agreement of the parties and the rules of arbitration give power to an arbitral tribunal by virtue of the fact that they guide the tribunal as to the duties that it may perform. The procedural law is there to ensure that the procedures are conducted in accordance with the law. Therefore, where the parties do not state how a particular aspect of the arbitration is to be performed, the tribunal may obtain guidance from the arbitration law at the seat of the arbitration as well as the power to perform the act.

An arbitration agreement is a deliberate policy of the parties to have their disputes resolved using the process of arbitration. A discussion of the essential attributes of an arbitration agreement at the outset of this thesis was vital as the validity of the arbitration is measured by these elements. An arbitral tribunal is only able to exercise powers emanating from a valid arbitration agreement, which is recognized as such by the applicable law. The parties may by consent choose to have their arbitration proceedings governed by rules of arbitration in which case they adopt the procedure provided by the rules and may in some cases have their arbitration administered by the institution under which the rules fall. This does not however prevent the parties from agreeing on procedures contrary to what is provided in their chosen rules. This is because the parties' choice to be bound by the rules is voluntary and as such they may depart from them depending on the circumstances of each case. It is important that the parties to an arbitration agreement agree on an arbitral tribunal that is to deal with their disputes or the means by which it may be appointed.

The study has shown that the extent of the parties' freedom and independence to choose the procedure by which their disputes are to be resolved is hampered by statutory restriction in the laws that they choose to govern their arbitration. In order to be legal an international commercial arbitration must adhere and conform to the chosen systems of law. The arbitration agreement, the way in which the arbitral tribunal conducts the arbitration proceedings and the ensuing award must all conform to the governing systems of law. This is necessary as it acts as a check on the way in which the parties exercise their power of choosing their dispute resolution procedures. This check is essential if the ensuing final award is to be recognized and enforced at law.

The consent of the parties on how the arbitration is to be conducted forms the basis upon which the whole process of arbitration is founded. The parties must agree on every aspect of the arbitration including what should happen in the event of them failing to agree. In instances where the parties remain silent on how an aspect of the arbitration procedure is to be handled and the governing rules of arbitration are also silent, an arbitral tribunal may refer to the arbitration procedure as it is provided at the seat of the arbitration. The procedure at the seat of the arbitration therefore functions as a mechanism available for use by the tribunal when none is provided. An arbitral tribunal may, when permitted by the parties, exercise discretion and draw guidance from the members of the tribunal and additional rules of arbitration on how it is to function effectively. The parties therefore take care of all aspects of their arbitration through the way in which they choose to exercise their independent controlling power of the arbitration.

The power of the parties to have the arbitration conducted by consent only extends up to the end of an arbitral tribunal's mandate. Thereafter, the parties are not obliged to agree on where the award may be enforced for instance or whether to challenge the award or not. The need to enforce the award is a unilateral decision that is made by the successful party, whose choice is *inter alia* determined by the location of the losing party's assets. In the same vein, a party may have his own independent reason for wanting to challenge an award. This study also showed that there is also an absence of consensus between the

parties when objecting to an aspect of the arbitration before the appointment of the arbitral tribunal or during the course of the arbitration process.

The English Act and now the Model Law as revised have a broad description of a written arbitration agreement that in essence includes an oral arbitration agreement as well. Any reference in writing to an oral arbitration agreement whose existence is not denied by the other parties qualifies that oral arbitration agreement as a written one. It remains for steps to be taken to revise Article II(2) of the New York Convention so that it may conform to the wide interpretation of a written arbitration agreement now pertaining. An arbitration agreement may be recognized as having complied with the writing requirement under the English Act and under the Model Law when made by a telephone call as long as there is a reference to it in either the parties' contract or in the pleadings which reference is not objected to by the other party. If Article II(2) of the New York Convention remains as it stands today, a question that needs to be answered is whether the qualification of an oral agreement as a written one referred to above is capable of satisfying and complying with Article IV(1)(b) of the New York Convention. There is a need to iron out the writing requirement as it affects the validity of an arbitration agreement and consequently the powers of a tribunal.

By virtue of their autonomy, the parties have got the prerogative of selecting their own team of arbitrators to resolve their disputes. In the event of their failure to agree, they must choose the mechanism that may be adopted. If this is not done, then the procedure provided by the arbitration law at the seat of the arbitration may be followed. The arbitrator's involvement in the process of selecting other arbitrators is minimal as this is in essence the job of the parties. Once appointed however, an arbitral tribunal is in charge of the arbitration and conducts the proceedings and makes decisions in accordance with the wishes of the parties.

Although the parties have got the prerogative to select any number of arbitrators, this study found that the general trend is for an arbitral tribunal to be composed of an uneven number of arbitrators, with one or three being the most favored. This position assists

with the finality of the arbitration process, as the presiding arbitrator is able to have a casting vote where there is no consensus on an issue or decision that is put to a vote. The ICC Court exercises control over the arbitration by confirming the appointment of an arbitral tribunal. This gives assurance to the parties of the suitability of their tribunal.

Where the parties fail to make a decision on the appointment of an arbitral tribunal, reference may be made to the procedural law. The system of law at the seat of the arbitration may through the use of its court machinery appoint an arbitral tribunal. When a court decides on such a matter, the Model Law does not permit an appeal of the decision to a higher court. This promotes finality of an issue. The English Act on the other hand however tends to be more relaxed and as such permits appeals, but with the leave of the court. These in-built restrictions prevent applications relating to the appointment of an arbitral tribunal from dragging unduly before courts and thus delaying the arbitration process.

The process of arbitration begins from a private set up to a publicly recognized one by virtue of the parties' agreeing to have a defined legal contract. The parties' rights and obligations are interpreted using the procedural law that is chosen by the parties. A defined legal relationship between the parties gives the arbitration its legality and efficacy. A privately arranged arbitration may be enforced using a public medium of courts. A legal system may only enforce an arbitration agreement that is valid by its own standards and that has satisfied the requirements of a valid arbitration agreement. However Article V of the New York Convention in dealing with awards may be considered as departing from this position. This is so because it prevents an enforcing country from recognizing and enforcing an arbitral award that is not recognized as binding or been set aside at the seat of the arbitration. Article V therefore requires an enforcing country to take on board the standards pertaining to the validity of the award that are set by the law at the seat of the arbitration. However, the fact that Article V uses 'may' and not 'must' means that the position should not be considered as absolute. It is for this reason that some courts tend to rely on Article VII of the Convention instead.

Article VII of the New York Convention permits an enforcing country to consider whether to enforce an award or not by its own benchmarks. There is therefore no reason why an award that is not recognized as binding at the seat of the arbitration or been set aside there may not be enforced in the enforcing country if that country recognizes it as valid. The Model Law and the English Act may be considered as showing compliance with Article V and not Article VII of the New York Convention, by adopting Article V in verbatim in their provisions. As such a party may be unable to enforce an arbitral award in England or in a Model Law country by relying on Article VII of the New York Convention.

It is clear that the enforcement and recognition of foreign arbitral awards is based on the New York Convention as well as on local laws. But the extent to which the New York Convention may be applicable in a member country in contravention of the country's sovereign laws is arguable. A proposition therefore that Article VII of the New York Convention be revisited in order for it to have a uniform application in its member countries would not be far fetched. It is easier as things stand to find Article V to be superior to Article VII when considering the harmonization of the process of arbitration and the need to recognize the binding nature of the process of arbitration, which is an essential attribute of an arbitration agreement.

The validity of an arbitration agreement should be gauged in accordance with the law to which the parties wish to subject their arbitration agreement in order for consensus and harmonization to prevail in international commercial arbitration. The law to which the arbitration is to be subjected must recognize it as an enforceable instrument. An arbitration agreement, like a final award, must conform to the public policy, social, political and economic interests of the legal system at the seat of the arbitration. This confirms the need for the parties to make choices that conform to their chosen regulatory laws. It is therefore evident that the powers of an arbitral tribunal lie in the agreement of the parties as read together with the law at the seat of the arbitration under which the tribunal functions. The *lex arbitri* to which the parties wish to subject their arbitration to, must recognize the issues in dispute between the parties as capable of being subjected to



the process of arbitration. In addition to that, the issues in dispute must fall within the scope of the arbitration agreement and must relate to the parties to the agreement. The correct identification of the issues in dispute between the parties is fundamental as it prevents challenges and helps speed up the arbitration.

By virtue of its separate nature from the parties' contract, an arbitration agreement's validity is gauged differently from the contract. Whereas the failure by an arbitration agreement to meet the essential attributes of an arbitration agreement under the law to which the agreement is subjected to, may lead to its invalidity, the failure to meet the terms required in a contract may lead to a breach of contract. The rules of arbitration assist in determining the extent of an arbitral tribunal's powers under that arbitration by providing a procedural outline of the arbitration. In so doing the rules of arbitration must conform to the applicable law.

An arbitration agreement may come about in an indirect way through a treaty by a foreign investor's exercise of his autonomy and his accepting a standing offer to arbitrate from the country in which he has investments. The offer to arbitrate may result from a treaty to which his country and the country of his investment are members. Countries that enter into treaties may, where a treaty provides for arbitration, make a standing offer to arbitrate to foreign investors of member countries of a treaty. It is only when the offer is accepted that an arbitration agreement may come into being. It is from the provisions of the arbitration agreement that the extent of an arbitral tribunal's powers may be ascertained.

Each arbitrator is under an obligation to conduct himself in a manner befitting of a person called to conduct juridical duties. Fair play is fundamental. This may be achieved by an arbitrator committing himself to abide by the requirements of disclosure, impartiality, independence and the upholding of confidentiality to the extent required by the parties. This is a threshold that arbitrators must strive to attain. The parties in a Model Law country may not confer power on a tribunal that breaches Article 18 of the Model Law, which is a mandatory provision. The failure to abide by these set standards of behaviour

may lead to a personal attack of an arbitrator by a party who feels aggrieved by the arbitrator's conduct. The New York Convention limits the grounds for raising a challenge against the enforcement of an arbitral award to procedural unfairness. But it is possible for an arbitrator to be biased or partial without being procedurally wrong. In such a case, a party may be left with no remedy at the enforcement stage of the award under the Convention. However, remedies may be available under local laws.

In an effort to enable the tribunal to complete its work as scheduled, the Model Law uses time as a safeguard when an arbitrator is personally challenged. The application may only be entertained when raised within the permitted time limits. The English Act offers protection to an arbitral tribunal that errs by granting it immunity from liability for acts committed whilst conducting the arbitration so long as such conduct is not in bad faith.

An arbitral tribunal has a responsibility of ascertaining the parties' position on confidentiality as this may fluctuate from one set of arbitration rules to another and from country to country. The tribunal ought to conduct itself within the parties' agreed position. The fact that most countries are non-committal on the question of confidentiality gives the parties an independent control of this position. The rules of arbitration however provide guidance on the extent to which confidentiality may be maintained during the arbitration proceedings.

This study also showed how the parties give ultimate authority and power to an arbitral tribunal to resolve the issues in dispute between them and make a final award. This is a duty that is entrusted by the parties to the tribunal exclusively. The way in which a tribunal handles this duty is reflected in the credibility of the final award. The tribunal is obliged to exercise the powers that the parties avail to it in ironing out the differences between the parties and giving the remedies as prayed. The tribunal is required to adhere to the orders for directions subject to the procedural law. In the event of any conflict between the parties' orders for directions and the procedural law, the procedural law should prevail. The tribunal must also consider any public policy considerations at the seat of the arbitration. As most arbitration proceedings relate to facts in dispute, in the

normal course of the arbitration process, a tribunal is able to conduct arbitration proceedings and make a final award without any reference to the system of law governing the arbitration proceedings. The tribunal must however acknowledge the provisions of the law within which it is working by abiding by its terms. The power that the tribunal obtains from the arbitration agreement is designed to enable it resolve the parties' dispute conclusively. The study therefore in essence shows that the powers of an arbitral tribunal to deal with a dispute conclusively are usually sufficient although further powers may assist in reducing the court intervention that currently exists.

The parties have an independent right to choose an arbitration procedure that is embraced by the law at the seat of the arbitration and its chosen rules of arbitration. The parties may in certain circumstances permit an arbitral tribunal to exercise limited powers in procedural issues in a default manner. The procedural boundaries that the parties set ought to be strictly adhered to by an arbitral tribunal unless the parties agree to permit it to exercise discretion. The parties' choice of arbitration rules to govern its procedures is done on a voluntary basis and as such the parties may agree to depart from some provisions and be partially bound by the rules. In circumstances where the tribunal exercises discretionary powers, there must be evidence of reasonably compelling reasons to support its decisions.

Where the exercise of discretionary powers is concerned, the ICC Rules when compared to the UNCITRAL Rules tend to give a lot of leeway to the tribunal to make decisions on procedural aspects when the rules are silent, thus promoting flexibility. For instance, the tribunal is permitted to choose any rules of procedure to govern the arbitration proceedings if the ICC Rules are silent on this issue. The tribunal may also decide its own procedural timetable by virtue of it drawing the Terms of Reference. The tribunal may also be able to block the parties' additional applications such as those relating to new claims that are filed late. The UNCITRAL Rules on the other hand permit a tribunal to conduct proceedings in a manner it considers appropriate, but subject to the rules. Whilst this procedure is less daunting, it is restrictive in the sense that it does not give the tribunal much flexibility.

The arbitral tribunal's exercise of the procedural power to hold preliminary meetings forms the foundation of how the arbitration is to progress. By virtue of a preliminary meeting, the tribunal is able to design its own case management style, which must receive the approval of the parties. Through the preliminary meeting, a tribunal may be able to find common grounds between the parties that may lead to a possible amicable settlement of the case in some instances, thus saving the parties costs. Even where the amicable settlement is not achieved, the tribunal may still be able to iron out some procedural issues in a preliminary meeting. The holding of preliminary meetings is a management tool that is favored by the ICC Rules and which may also be used in an arbitration conducted under the UNCITRAL Rules as the parties permit the tribunal to conduct the proceedings in a manner it considers appropriate.

As the holding of a preliminary meeting is an exercise of a procedural power, it requires the input of the parties. Through a preliminary meeting, a tribunal may be able to find common grounds on issues relating to the language of the arbitration, the seat and venue of the arbitration. Some rules of arbitration such as the ICC Rules for instance do not give any default power to an arbitral tribunal to select the seat of the arbitration whilst the UNCITRAL Rules do. Whilst an arbitral tribunal may, when permitted only select one seat of arbitration, it may select more than one venue depending on the convenience of the locations to the parties and the tribunal as well as the situation of the witnesses. As the home of the arbitration, the tribunal is bound by the *lex arbitri* whilst it must respect the laws at the venue of the arbitration proceedings. Where parties choose not to transfer any procedural powers to the tribunal, it is obliged to conduct itself in accordance with the parties' choice of procedure.

Unless unforeseen circumstances arise such as the non-attendance of a party or an arbitrator, the procedure agreed to in the preliminary meeting ought to be strictly adhered to. Any change in the set procedure must be recognized at the seat of the arbitration and be with the parties' consent. In the absence of the agreement of the parties, a party may be justified in objecting to such an act. There are however some changes in the venue for instance that the parties may agree to in an effort to ensure that the arbitration progresses.

These include a change in venue due to a change in the chosen country's political climate, a change made for the convenience of the witnesses, the tribunal or the parties. An arbitral tribunal owes the parties a responsibility of ensuring that it makes an award that is binding and final. It must further strive to ensure that its award is capable of enforcement and can withstand challenge. An arbitral tribunal's exercise of its power to make an arbitral award must take into consideration the agreement of the parties, the *lex arbitri* and the extent of its jurisdiction. It is by virtue of the arbitration agreement that the parties become bound to the arbitral award and it is by reason of the local laws that it becomes enforceable. Although it is the duty of an arbitral tribunal to respect and abide by the parties' chosen procedures, the tribunal ought to see to it that the way in which the parties wish it to handle the award is acceptable under the local laws. It must therefore work towards making an arbitral award within the time frame that is set by the parties to the arbitration agreement. The duty to abide by the procedural mechanism that is set by the parties does not however prevent each arbitrator from exercising his independence of judgment and refusing to sign an arbitral award that he does not agree with.

An arbitral tribunal may only be said to have exhausted its mandate if it produces an award made within the confines of its jurisdiction. An award made in excess of jurisdiction or power may be challenged and it does not make an arbitral tribunal *functus officio* if it does not completely answer the points in issue. The essential attributes of the award and the types of awards that it may make must conform to the standards required by the local laws. The tribunal is under an obligation to address all aspects of the parties' dispute and answer them completely with an award of an appropriate remedy. An appropriate remedy is one that aims to put the aggrieved party as close as possible to the position that he may have been in before the dispute arose. Consequently, where permitted, if the award of interest or costs would help the tribunal achieve this goal, then it may award the party interest and costs.

An arbitral tribunal may where the *lex arbitri* permits make several orders and awards in the course of the arbitration proceedings in order to clarify issues to the parties as they arise. A tribunal's address of procedural or jurisdictional questions is different from its



address of the subject matter in dispute between the parties as whilst the resolution of the former results in an order, the resolution of the latter results in an award. An address of a question of liability for instance results in an interim award, which may qualify to be a final award if the question has been dealt with completely and a remedy is granted. Such an issue cannot be revisited as it becomes *res judicata*. However, if the question of liability is addressed and revisited by the tribunal when it is dealing with the question of damages, then the earlier award may not qualify to be a final award. The final segments of an award however form the final award after all the issues in dispute have been dealt with and the remedies are granted. It is only at this time that an arbitral tribunal's mandate comes to an end.

The subject matters in dispute between the parties that an arbitral tribunal may deal with and those that may be dealt with by national courts, is a question that is determined by each legal system. The study has shown that there is a correlation between the arbitrability of a subject matter in dispute to the question of the jurisdiction of an arbitral tribunal. Both areas draw a boundary of the extent of a tribunal's power to deal with the parties' dispute. The power of an arbitral tribunal to deal with the issues in dispute is dependent upon whether it has jurisdiction to do so and whether the law to which the parties choose to subject their dispute to, recognizes that dispute as arbitrable. The questions that have to be answered in the affirmative to confirm this position is whether the parties to the arbitration agreement have permitted the tribunal to address an issue before it and whether the system of law in the country where the question of arbitrability is raised permits such a course of action.

Therefore, as much as the agreement of the parties may draw the boundaries within which an arbitral tribunal is to function and exercise power, this boundary must be confirmed by the parties' chosen law and the public policy requirements in that country. An arbitral tribunal must therefore have the parties' mandate to deal with issues in dispute between them and it must also be authorized by the local laws to deal with such issues, as it is not all issues that a legal system may wish to be addressed by the use of the process of arbitration. As each country has its own benchmarks as to the matters that

may be dealt with through the use of the process of arbitration and those that may not, it becomes evident that there is no uniformity on this issue among countries that support the process of arbitration. An arbitration agreement may therefore only be considered as valid by a system of law if it deals with a subject matter that is arbitrable in that country. It is only when this is so that an arbitral tribunal's jurisdiction and power to handle the dispute in a country may be confirmed.

The questions of whether an issue in dispute between the parties is arbitrable and whether an arbitral tribunal has jurisdiction though correlated are answered under different standards. The arbitrability of a subject matter is a question that is determined in accordance with the standards that are set by the legal system in the country where the question is raised. The said country must consider the arbitration agreement as valid and relating to an arbitrable subject matter by its standards. By determining this question in the affirmative, the court machinery in the country where the question is raised will be confirming that the matter may be subjected to the process of arbitration and a tribunal may prevail over it. It is important that a party raises an objection immediately he becomes aware of the issue that is the subject of the objection.

When the question is raised before the arbitral tribunal is constituted, it may be non-territorial if raised in the country in which the respondent is domiciled. The applicant will basically be requesting the court to compel the respondent to go to arbitration as agreed, as the issues in dispute are capable of being subjected to the process of arbitration. If the issues in dispute are arbitrable, the court may send the matter to arbitration under the jurisdiction of an arbitral tribunal. However, if the issues are not arbitrable, the court assumes jurisdiction and determines the case.

A question of the arbitrability of a subject matter when raised after an arbitral award is made is raised in the form of a challenge against the award. The issue is territorial at this stage as it is raised in a court at the seat of the arbitration, which has jurisdiction to determine a challenge against an award. A confirmation of the arbitrability of the subject matter confirms that the tribunal had jurisdiction to deal with it. A losing party may raise

the question of arbitrability as a defence against the enforcement of an arbitral award. If the question is raised at the enforcement stage however, it becomes a non-territorial issue as it is decided in the country where the losing party has assets in accordance with that country's own legal standards.

It is evident that the question of arbitrability may only be determined by a particular legal system in accordance with its own benchmarks. In this way, countries control the types of issues that may be subject to the process of arbitration within their borders. A country's public policy limitations prevent certain issues from being sent to arbitration. A country may in general not be inclined to send matters that border on its security or sovereignty to arbitration. Each country holds its own list of arbitrable issues that may change depending on a country's mandatory provisions and public policy considerations pertaining at that point in time. The arbitral tribunal has got a responsibility to inform the parties if it finds that the issues in dispute are not arbitrable under the parties' chosen law. This assists the tribunal in ensuring the enforcement of its award.

Whilst the determination of the question of arbitrability of a subject matter in dispute lies in the domain of a national court, the determination of the question of the jurisdiction of an arbitral tribunal lies in the domain of an arbitral tribunal at least in the first instance by virtue of the principle of *competence-competence*. The principle enables a tribunal to test its own jurisdiction and confirm the extent of its power whilst acting as a judge in its own court. An arbitral tribunal determines the question of its jurisdiction during the course of the arbitration proceedings. This power of an arbitral tribunal is one of the pillars of the process of arbitration as it promotes party autonomy in the arbitration process by delaying court intervention until after the tribunal has decided on the matter. A party is obliged to raise an objection immediately he becomes aware of the tribunal's lack of jurisdiction. In dealing with this objection, an arbitral tribunal may deal with it in whole and issue an award thereto, or it may deal with the question in its final award on the merits.

The positive aspect of this power of the tribunal is that it cures the excesses of jurisdiction or any lack of it by granting an objecting party with immediate remedy thereby saving costs and time. The downside of this power of the arbitral tribunal is that a party is still permitted under the English Act and the Model Law to revert to court during the course of the arbitration proceedings if he is not happy with the decision of the tribunal. However the time within which such an application may be made to court is of the essence. The English Act in fact goes further under Section 72 to permit a party to an arbitration agreement that chooses not to participate in the arbitration proceedings to request a court to determine a jurisdictional question that is not tabled before a tribunal subject to that party notifying the other of his intentions.

The court's role in the arbitration process is confined to applications relating to attacks on a tribunal's jurisdiction; procedural issues; questions of law and the enforcement of an arbitral award. Time limits have been used as a tool to restrict court intervention in the arbitration process under the Model Law and the English Act at different levels. The Model Law tends to provide time limits within which the court may intervene which have closed ends thus ensuring that there is no undue delay in the arbitration process. The Model Law further permits the arbitration proceedings to continue whilst a party seeks the protection of a court thus showing the ancillary role that the court plays in the process of arbitration.

The English Act has a somewhat relaxed approach in terms of time limits within which a court may intervene. This approach accommodates unforeseen circumstances that may make a party fail to meet a restrictive deadline. As such the English Act permits, in a mandatory fashion, a party with a cogent reason that fails to meet set time limits of seeking court protection to do so. In terms of the extent of court restriction on this score therefore, the approach taken by the Model Law is more supportive of party autonomy than that of the English Act. However, the fact that there is this difference in approach between the Model Law and the English Act is healthy as the parties have a choice of the system of law they want depending on the circumstances of their case.

As Article 5 of the Model Law and Section 1(c) of the English Act show, court intervention should be cut to a minimum in recognition of the parties' deliberate choice of arbitration as a means by which their disputes are to be resolved. Identifying the reasons that lead parties to seek intervention from the courts in procedural and jurisdictional matters during the course of the arbitration proceedings may assist in strengthening the rules of arbitration to provide guidance to the parties in these areas. In this way court intervention may be minimized. The parties may then only seek court intervention on points of law and at the enforcement stage of the award.

The powers of an arbitral tribunal may be extended through the strengthening of the rules to enable the tribunal to deal conclusively with issues that it is able to deal with, and for the parties to only resort to court in areas where the tribunal does not have the power to deal with an issue. Possible changes to the rules of arbitration to accommodate this scenario may, it is hoped, further restrict court intervention. In Scotland for example, a separate Code of Arbitration exists that provides for court intervention on issues where the arbitration law does not permit court recourse. Such an arrangement is healthy as it does not completely close the door to court intervention, but gives the parties a choice depending on the circumstances of their case. The existence of choice of procedure however is essential as it is one of the attractive features to the process of arbitration.

The power of an arbitral tribunal to rule on its own jurisdiction for instance may be left to the arbitral tribunal to decide completely, with a party only being able to seek court recourse after an arbitral tribunal's mandate comes to an end. As the parties entrust the tribunal to deal with their dispute in an exhaustive manner, it may also be entrusted to address an issue pertaining to its jurisdiction or procedure exhaustively as well. This may increase the powers of an arbitral tribunal but may in the process also increase the parties' reliance on rules of arbitration. The reviews of the jurisdictional or procedural decisions of the tribunal may arise when the tribunal's mandate terminates where need be. In this way, the procedure may be more defined. The downside of this arrangement however, may be for a party that has reason to believe that the tribunal has got no jurisdiction continuing with the proceedings and then proven right later by the court.



This may prove to be more costly in the end. This study however is more inclined to favor the position of increasing the powers of an arbitral tribunal through possible changes to the general law regulating the process of arbitration. The strengthening of the rules of arbitration may be a step in the right direction, although the parties that do not choose rules may still be left with no alternative but to seek the protection of the court.

Before the appointment of an arbitral tribunal, court intervention acts a vital role in supporting the process of arbitration, as the tribunal is not yet in control of the arbitration. The court therefore ensures that the parties that have chosen to have the disputes resolved using the process of arbitration achieve their wish. The court may also help the parties in the appointment of their tribunal if they have problems in doing so. The court may further intervene for purposes of granting interim relief to a party that makes such a request in order to ensure that the process of arbitration does not become an academic exercise. It is difficult to restrict court intervention at this stage of the arbitration proceedings, as the parties may not have anywhere else to turn to. The parties to an arbitration agreement are not obliged to select a set of rules to govern their arbitration and therefore they may get guidance from the court when they are unable to agree at this stage of the proceedings.

The court's review of an arbitral tribunal's actions after its mandate comes to an end, promotes justice. Under the Model Law, a party may only seek the court to review the tribunal's conduct of the arbitration proceedings under Article 34 whilst using very limited grounds. The English Act on the other hand permits court recourse after the award in three ways under Section 67, 68 and 69, with restricted grounds. The restrictions are a good way of promoting finality in arbitration. In most Model Law countries, an arbitral tribunal's findings of fact are final although this is not the case with England that permits appeals on questions of law and a tribunal's findings of fact under restricted terms under Section 69. The court therefore assumes a supervisory role to check whether the arbitral tribunal conducted itself in accordance to the standards set by the parties as read together with the governing laws. As a result of the court's review of the arbitral tribunal's actions, the court may permit an arbitral tribunal to correct or

rectify the errors or issues in contention respectively, thereby ensuring the enforcement of the award. Generally speaking however, a court may not interfere in the award on the basis of the fact that the tribunal made an error of fact or law, even if the error was manifest.

By virtue of the New York Convention, a court in the country where the recognition and enforcement of the award is sought may grant enforcement to a party that satisfies the requirements set by Article IV of the Convention. The court may further deal with applications for challenge pertaining to the enforcement of the award. A party that refuses to have the award enforced only has very limited defences. This kind of court intervention is a cornerstone of the process of arbitration, and can therefore not be avoided. As a party may have to request for enforcement in a country where the losing party has assets, that jurisdiction must authorize the enforcement subject to its local laws or Article IV of the Convention. It is encouraging to note that countries that favor the process of International Commercial Arbitration have ensured that the role of an arbitral tribunal in the arbitration process is respected and its powers are not interfered with. The arbitral tribunal is therefore given the independence to conduct the arbitration proceedings in accordance with the parties' wishes and on condition that it abides by the regulatory laws.

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